

‘England has no Constitution ;  
she has only Institutions.’

NAPOLEON.

THE  
PRESENT JURIDICAL STATUS  
OF THE BRITISH DOMINIONS  
IN INTERNATIONAL LAW

BY

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## PREFACE

THIS book is founded on a course of lectures delivered at the Academy of International Law at The Hague in the summer of 1927. It is, in fact, a translation of a written version of those lectures which has been published in the annual *Recueil* of the Academy of International Law. I have to express my deep gratitude to the Curatorium of the Academy for their kindness in permitting this English edition of my work to be published.

The fact that the book was originally written for an international public explains in part the form which it has taken. It is hoped that it has not made it unsuitable for readers in Great Britain or the Dominions.

Those who are familiar with the existing literature about Dominion Status will know that much of this book deals with matters that have been to a greater or less extent the subject of controversy in recent times. The author has sought to shirk no difficulty of any kind which previous controversy may have raised; he has sought to elucidate obscurities where he is able to do so, and to state them frankly where he is not. He has no preconceived doctrine to defend, but is concerned only to interpret the facts of British and Dominion practice as fully and faithfully as he can.

Readers who are familiar with the existing literature will also realise how greatly the author is indebted to

previous writers. There are many whom he might mention, but he desires particularly to express his special obligations to Sir Cecil Hurst, to whom the world at large owes much for his distinguished services in the advancement of International Law, and to whom the present writer has personal cause for gratitude; to Mr. Duncan Hall, whose original and cogent thinking has been of great help to all who have come after him; to Professor H. A. Smith, who was kind enough to lend the author the proofs of the particularly valuable work, *Canada and World Politics*, written by himself and Professor P. E. Corbett; and to Professor Arnold Toynbee, who has put together in an accessible form much valuable information concerning the post-war practice of the British Commonwealth which was previously very difficult to obtain.

The author must also express his warm gratitude to Dr. A. D. McNair, the editor of Messrs. Longmans' series of *Contributions to International Law and Diplomacy*. Dr. McNair has no responsibility for the views expressed in these pages, but he has given unstinted and most generous assistance to the author in his work. Dr. McNair's patience and learning have been of inestimable service to the author, and have helped him to remove many errors and defects in his work.

PHILIP NOEL BAKER.

March 8, 1929.

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## CHAPTER I

### INTRODUCTORY

BEFORE 1914 it was never seriously suggested that what are now called the 'British Dominions' had in International Law any separate status or personality of their own. Among authoritative writers on the subject, Oppenheim was the first to put forward such a view. In the third (1920) edition of his greatest work he declared that after the Great War their position 'underwent a fundamental change.' 'Without doubt,' he said, 'their admission to the League of Nations gives them a position in International Law'; but he went on to explain that their place in the Family of Nations 'defies exact definition.'<sup>1</sup>

Most subsequent authors have accepted Oppenheim's contention that the Dominions to-day have 'a position in International Law,' but most of them, unfortunately, have also tacitly accepted his concluding dictum that it is a position which 'defies exact definition.'<sup>2</sup> With great justice, M. Henri Rolin has protested that this is not enough. 'Ne peut-on affirmer,' he asks, in arguing that it is only by a confusion of thought that the Dominions can be accorded any true status in International Law—'ne peut-on affirmer que toute situation

<sup>1</sup> Oppenheim, *International Law*, 3rd ed. (1920), i. §§ 94a, 94b.

<sup>2</sup> Cf. Keith, *Responsible Government*, 1928 ed., vol. ii. p. 882: 'The effect on the Dominions of the mode of negotiation of the treaty of peace and entry into the League of Nations was much discussed in the

Dominions' Parliaments in 1919, and has since been variously estimated, nor in fact is it possible with any confidence to say what has been the effect.' And again on p. 884: 'In point of fact, the application of the terms of the Covenant to the Dominions is full of perplexities.'

juridique est susceptible d'être analysée?' And he gives reasons why such an analysis should be made. 'L'intérêt doctrinal suffirait déjà à justifier un effort de recherche scientifique. Il faut, au surplus, que les gouvernements en relation avec les Dominions sachent quelle est, en principe, la condition juridique de ceux-ci.'<sup>1</sup>

M. Rolin is unquestionably right. It is not enough vaguely to declare that the Dominions have to-day a place in International Law, without at least attempting to explain both in principle and detail what are the scientific and the practical results to which that declaration leads. Yet in fact no systematic effort has so far been made by those who accept Oppenheim's contention to furnish the analysis for which M. Rolin has so justly asked. It is for that reason that this study has been undertaken. No such study can at the present time be either complete or satisfactory, for there are problems which, though they can be analysed, cannot as yet be solved. The development of Dominion status has not yet reached its end; it is still, as it was when Oppenheim wrote of it in 1919, in a stage of growth and change. But its progress since then has been so rapid, some results at least are so clearly and so finally established, that a comprehensive statement of the present situation of the Dominions is urgently required. The statement which follows omits no essential elements, and shirks no difficulties, of which the writer is aware.

Much of what follows consists of a discussion of the effect on Dominion status of two documents of historical importance. The first of them is the Covenant of the League of Nations; the second is the Report of the Committee on Inter-Imperial Relations

<sup>1</sup> *Revue de Droit International et de Législation Comparée*, 3rd Ser., vol. iv. (1923), p. 206.

of the British Imperial Conference of 1926.<sup>1</sup> Together these documents constitute the written basis of the international and constitutional position of the Dominions. Both of them enunciate principles that do not merely summarise the progress of the past, but furnish also the key to future change. But neither of them can be really understood unless it is examined in the light of the political and constitutional events from which it sprang. For these events illuminate texts that would otherwise in many places be obscure, and throw into sharp relief the outline of the picture which it is the purpose of the student to construct.

No doubt the same is true of every document of legal and constitutional importance: that while its meaning must be determined in the courts by the interpretation of its text alone, its full significance can often only be grasped if it is considered against the background of the historical development that has gone before. But it is particularly true and particularly important of documents that relate to the Constitutional Law of British political institutions. For in the development of the Constitutional Law of these institutions, changes, and changes of capital importance, are often made by what are called 'constitutional conventions.'<sup>2</sup> Continental lawyers sometimes find it difficult to grasp exactly what English writers mean by these 'conventions.' But they are, of course, no more and no less than the effective recognition, tacit or written, of new practices that by general consent modify or change in their application the existing rules of the statutory law of the Constitution. Such conventions involve the consequence that, for a time at least, and perhaps for

<sup>1</sup> Cmd. 2768 (1926).

<sup>2</sup> Also called by Dicey 'Political Conventions or Understandings': *Law of the Constitution*, 7th ed., pp. 22 *et seqq.* Cf. also: 'In the daily

working of Parliamentary government vast alterations . . . had been made during the lapse of more than a century, but these alterations were the result of political conventions': *Law and Opinion in England*, p. 84.

a long time; 'law and fact may be more or less discordant.' So writes Salmond; and he continues: 'Much constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist *de jure* but not *de facto*, or *de facto* but not *de jure*.' <sup>1</sup> But he adds: 'Although the constitution *de jure* and the constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of state organisation tend to mould legal theory into conformity with themselves. . . . 'Conversely, the accepted legal theory endeavours to realise itself in the facts.' <sup>2</sup> Thus it is by practice, by custom, hardening, sometimes rapidly, into conventions, that the constitutional arrangements of a political society are changed.

This happens to a greater or a less degree in the institutions of every organised political society. But it happens far more often and in far more important matters in British institutions than in those of other states. A very eminent authority, T. E. Holland, has gone so far as to assert that in Great Britain the 'Constitution' is nothing more than 'an unwritten body of custom,' <sup>3</sup> both built up and changed by custom. Salmond makes some more precise distinctions. 'Nowhere,' he says, 'is the discordance between the Constitution in law and in fact more serious and more obvious than in England. A statement of the strict legal theory of the British Constitution would differ curiously from a statement of the actual facts.' <sup>4</sup> Thus, for example, 'the consent of the Crown is no less necessary to legislation than is that of the two Houses

<sup>1</sup> Salmond, *Jurisprudence*, 4th ed., p. 109.

<sup>3</sup> Holland, *Jurisprudence*, 11th ed., p. 368.

<sup>2</sup> *Ibid.*, p. 109.

<sup>4</sup> Salmond, *loc. cit.*, p. 109.

of Parliament. Yet in fact the Crown has no longer any power of refusing its consent.'<sup>1</sup> *Legally*, that is to say, the King still has the right of veto; *constitutionally*, that right is absolutely dead; if he tried to exercise it he would be guilty of an unconstitutional act, and if he persisted he would provoke a revolution. And this fundamental change has been made by practice, without even the smallest alteration of Statute Law. Similarly, self-government was introduced into the Dominions without any alteration of the law; the Cabinet, which is in all the British countries the supreme organ of executive government, is unknown to the law;<sup>2</sup> the Imperial Conference, the keystone of the present system of the 'British Commonwealth,' rests on no statutory foundation of any kind.

This 'distinction between the Constitution in law and in fact' must not, of course, be overstated. 'Constitutional conventions' are not wholly divorced from Statutory Law; still less can they contravene an express statute. On the contrary, as H. A. Smith has said, 'No action of any Government, official, or public body can be justified unless it is sanctioned by some definite legal rule that can, if necessary, be defined and enforced by the courts. . . . All that the conventional rule can do is to say that the discretion which the law vests in a particular individual or assembly shall be exercised in such and such a way. For example, the law declares that the King can make treaties with foreign states by virtue of the royal prerogative; the conventional rule says that he can only exercise this power upon the advice of ministers who are responsible for that advice to Parliament.'<sup>3</sup> Again, Smith

<sup>1</sup> *Ibid.*, p. 109.

<sup>2</sup> Cf. Sir F. Pollock: 'The Cabinet is the real centre of executive power and the origin of almost all effective legislation, but, having no place in the legal structure of the Constitution,

it has no means of doing anything in its own name.' *Essays on the Law* (1922), p. 125.

<sup>3</sup> *Canada and World Politics*, pp. 23-4.

says: 'Conventions can only be effective within the limits marked out for them by law.'<sup>1</sup>

But when in any sphere of government or administration statutory limitation is absent, then in that sphere constitutional conventions may have free play. And it so happens that in the British system of government, executive action in respect of relations with foreign states is based exclusively on the old common-law prerogative of the Crown, and there is no statutory limitation of any kind. It follows that in respect of the control of relations with foreign states, constitutional conventions are of particular importance.<sup>2</sup>

Since all this is true, it is also true, as M. Rolin has remarked, that the international consequences of innovations in the Constitution of the British Empire, like the innovations themselves, 'ne devraient pas nécessairement résulter de textes législatifs ou de conventions.'<sup>3</sup> In considering the status of the Dominions, we are in a sphere where it is peculiarly true to say that *ex facto oritur jus*. And that has, as M. Rolin goes on to point out, the disadvantage that it is particularly difficult to distinguish at any given moment the conceptions that are recognised by all the parties interested, that is to say, *law*, from the political tendencies peculiar to one or more parties—tendencies which are 'not law but merely facts.'<sup>4</sup>

But, just for this reason, it is, as was urged above, especially important, in considering the present status of the Dominions, to pay attention to the political facts of the existing situation, and to the historical development of which those facts are the result. This study will begin, therefore, with two short sections devoted, not to the discussion of legal theory, but to a descrip-

<sup>1</sup> *Canada and World Politics*, p. 25.

<sup>2</sup> *The British Commonwealth of Nations*, by A. Lawrence Lowell

and H. Duncan Hall (World Peace Foundation), 1927, p. 564.

<sup>3</sup> *Loc. cit.*, p. 197.

<sup>4</sup> *Ibid.*

tion of the facts and events that make up the political and constitutional background of the problem. This description must obviously be brief, and must omit much that is of historical importance. Fortunately for the present purpose, this is of no account. The political development of Dominion status has been dealt with by many authors in great detail, and with a wealth of learning to which the present writer can lay no claim.<sup>1</sup> It will serve the present purpose if the succeeding chapters give a faithful summary view of the undisputed facts to which these authors have previously called the attention of the world.

<sup>1</sup> *E.g.*:—By A. Berriedale Keith, *Responsible Government in the Dominions*, 3 vols., revised edition in 2 vols., 1928; *The Constitution, Administration, and Laws of the British Empire*; *History of the Peace Conference of*

*Paris*, vol. vi., chap. iv., part i.

Edward Porritt, *The Fiscal and Diplomatic Freedom of the British Oversea Dominions*.

H. Duncan Hall, *The British Commonwealth of Nations*.

## CHAPTER II

### THE ESSENTIAL POLITICAL FACTS ABOUT THE BRITISH EMPIRE: THE 'NATIONHOOD' OF THE DOMINIONS AND THE UNITY OF THE 'COMMONWEALTH'

ON July 1, 1927, the King of Great Britain sent to the Government of Canada a message of greeting of which the following was the most important part: 'To-day my people of Canada celebrate the Diamond Jubilee of Confederation. . . . In sixty years the territories of the Confederation have been multiplied by tenfold; its Government is to-day responsible for the destiny of nearly ten millions of inhabitants. By the labours of peace and the sacrifices of war, Canada has become a mighty nation.'

In these simple sentences much constitutional doctrine and much political wisdom are enshrined. For the essential and fundamental facts about the position of Canada, and therefore of the other Dominions, in the British Empire are, first, their continued union through their common allegiance to a single Crown; and, second, their nationhood. The King's words were rightly chosen; the Canadians are to-day 'his people of Canada,' and without question they constitute 'a mighty nation.'

These facts are of such importance to the proper understanding of Dominion status, that it is necessary to define more closely what is meant when it is said that the Dominions are nations united by a common allegiance to a single Crown. But before that is

attempted, it must be explained what units of the British Empire are held to be 'Dominions'; which are the 'nations' whose present status is to be discussed. For this again has its reflex action on the study of that status, since law is never free from the influence of political fact.

The British Empire consists of more than sixty different governmental units. Each unit is, in a certain restricted sense, self-governing, independent of the rest; each has its own separate constitution; its own separate administrative system, with a chief of the executive at its head; its own legislative organ; its own legal and judicial system; its own budget; its own police system for the maintenance of public order—in short, each has a separate and complete machinery of government to itself. But while they are all alike in this, the various overseas units differ profoundly in their relation to the Mother Country. They fall, indeed, into three distinct categories.

First, there are the units which, while they have their own separate systems of government, are nevertheless in fact subordinate to the Government in London. In the supreme control of their administration, and even, as a rule, of their legislation, these units are subject to the will of a British Minister, who in turn is responsible to the British Parliament. They are by far the most numerous category of all: including, as they do, all the Crown Colonies, the Protectorates, and the Protected States of the British Empire, they number more than fifty. The relation of Great Britain with these units varies in the degree of its autocracy; but in every case it is a truly 'Imperial' relation. Indeed, it is this relation that justifies the present use of the word 'Empire'; these units are now the British Empire proper.

Second, there are the units which are really self-governing, which control their own affairs in freedom, which are subject to no external direction of any kind. They are seven in number :

Great Britain and Northern Ireland.  
 The Dominion of Canada.  
 The Commonwealth of Australia.  
 The Dominion of New Zealand.  
 The Union of South Africa.  
 The Irish Free State.  
 Newfoundland.

These units form an integral part of the complex political organism that is still called the British Empire, but their relation with each other is in no way 'Imperial.' Indeed, the absence of subordination of any kind is now so much the predominating characteristic of the relation that a new nomenclature has been evolved ; when in their political declarations, or even in official Acts of State, statesmen desire to speak collectively of these autonomous units, they speak of the 'British Commonwealth of Nations.'<sup>1</sup> The phrase is now recognised to mean the 'group of self-governing communities'<sup>2</sup> whose names are given above.<sup>3</sup>

<sup>1</sup> Cf., e.g., Report of the Imperial Relations Committee of the Imperial Conference of 1926, § 4 (b) *et passim*. Cmd. 2768 (1926), p. 16.

<sup>2</sup> *Ibid.*, p. 14.

<sup>3</sup> Cf. speech by General Hertzog at Pretoria, December 20, 1926: "Commonwealth of Nations" is the name for Great Britain and the Dominions in their free associations under the Crown. The sovereign freedom of the individual members of the alliance is not interfered with thereby—that is to say, by their free association. This also applies to the term "British Empire," under which name come to stand

grouped the Dominions under Great Britain, as well as India, Rhodesia, and other nations under the Crown, which stand outside the circle of the Commonwealth of Nations.' *Cape Times*, December 21, 1926. Cited by Lowell and Hall, *op. cit.*, p. 685. Cf., however, Keith, *Responsible Government*, 1928 ed., vol. ii. p. 892: "The effort to differentiate between the British Commonwealth and the British Empire is idle folly. The former expression, which is thoroughly objectionable, had never been used officially or in legislation outside the Irish Treaty until it made a sporadic re-appearance at the Imperial Conference of 1926 . . ."

Third, there are the units which are in a transitional condition—units which are not yet entirely free, but to which a certain measure of self-government has been already granted, and which in all probability will become fully autonomous within a relatively brief period of time. Sir Cecil Hurst, than whom there can be no higher authority on such questions, has written in a recent work that every dependent community in the Empire is on the way towards self-government of the fullest kind. 'Each of them, whether the population is predominantly white or predominantly coloured, is gradually, as it develops in strength and capacity, passing upwards from the stage in which the community is wholly subject to control exercised from London to that in which the measure of control diminishes, and so on to that in which the control has ceased entirely. The Dominions of to-day were Crown Colonies in the past. The Crown Colonies of to-day will be Dominions in days to come. There is nothing static about the British Empire.'<sup>1</sup> But while in this broad sense the condition of no unit in the Empire is constitutionally static, there are only three units which at present fall into the category of those to which true self-government has been in part accorded. They are Malta, Southern Rhodesia, and India.

Of these three, Malta is in a special position, and there is no prospect that within a measurable future it will acquire the status of a Dominion. It is not, therefore, of importance to the present purpose.<sup>2</sup>

Southern Rhodesia has been governed since 1923 by a Cabinet responsible to an elected Parliament; she is thus in a great measure 'the mistress of her own destinies.'<sup>3</sup> But her Government is still subject to

<sup>1</sup> *The British Empire as a Political Unit under International Law; Great Britain and the Dominions* (Harris Foundation Lectures, 1927), p. 12.

<sup>2</sup> *Vide* Keith, *Responsible Government*, 1928, pp. 50, 62.

<sup>3</sup> *Cf.* Sir C. J. B. Hurst, *loc. cit.*, p. 7.

certain Imperial restrictions ;<sup>1</sup> it has not been admitted to Membership of the Imperial Conference ;<sup>2</sup> it has not exercised in any way the rights of control over its international relations which the other fully self-governing units have obtained ; Southern Rhodesia has never yet been officially styled a Dominion—on the contrary, it has been officially referred to as ‘ a self-governing colony.’<sup>3</sup> Its future status, therefore, is quite uncertain ; it is thus correctly classed with those which are still in a transitional condition.

There remains India. India is still far from full autonomy. But much greater rights of self-government have been accorded to her than superficial critics have sometimes realised. Moreover, the policy of the British Government in respect of India is founded on the declaration of the Imperial Parliament contained in the preamble of the Government of India Act of 1919. This preamble enounces the ‘ declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in British India as an integral part of the Empire.’<sup>4</sup> The Act further provides that not later than 1929 a Royal Commission shall be appointed to investigate and recommend what further steps towards self-government can then be taken, and in 1928 this

<sup>1</sup> *E.g.* in respect of control over the very large native population, and of railway construction ; cf. Keith, *The Constitution, Administration, and Laws of the Empire*, pp. 242-6.

<sup>2</sup> But at the Imperial Conference of 1926 the Secretary of State for the Dominions informed the Conference that since Southern Rhodesia was now self-governing, ‘ he proposed to ask the High Commissioner in London to assist him in matters arising at the Conference, particu-

larly on the economic side, where the interests of Southern Rhodesia were concerned.’ This may be the beginning of full Membership of the Imperial Conference, but at present it is certainly far short of that. *Vide* Cmd. 2768 (1926), p. 10.

<sup>3</sup> *Ibid.* *Vide* also Keith, *Responsible Government*, 1928, pp. 35, 60, 366, 782-4. Also p. xx, where he says : ‘ Malta and Southern Rhodesia are not entitled to the style’ (of Dominion).

<sup>4</sup> 9 and 10 George V., c. 101.

Commission was actually set up. It may still be disputed how rapid progress in the development of this policy will be. But it cannot be disputed that there will be no turning back. It is certain that the present generation or the next will see an India that has full autonomy, an Indian Dominion with the same rights that have already been acquired by Canada, Australia, and the rest. Since India has a population of three hundred and twenty millions, three-quarters of the total population of the Empire, and since this population is of different race, different religion, different education, and different culture from that of the peoples of the present self-governing Dominions, its development towards autonomy is obviously a fact of capital importance to the future of the British Commonwealth system. In considering the present fabric of the Empire, and above all in considering the international status of the Dominions, it is necessary to remember that there is a great Asiatic people, three times more numerous than the inhabitants of the United States, who in the relatively early future will take their place with full rights beside the other self-governing members of 'the British Group.'<sup>1</sup>

India, it must be added, has already a certain international position of its own in virtue of the fact that under the terms of the Treaty of Versailles it became an original Member of the League of Nations. It is, moreover, a Member of the Imperial Conference of the British Empire. But in both organisms its position is vitally affected by the fact that its delegations do not speak for a Government that is free; they are subject

<sup>1</sup> It is perhaps worth noting that there are authorities who desire to add other non-Anglo-Saxon members to the British Commonwealth and its Imperial Conference. Thus Sir John Percival, late Judicial Adviser to the Egyptian Government, is re-

ported in the *Times* of June 18, 1928, as follows: 'In his opinion, Egypt had lost a magnificent opportunity in 1922 of securing real independence by failing to enter the British Empire as a free nation like Canada and Australia.'

to the instructions and the control of a British Secretary of State in Downing Street. Nor does India exercise in her general international relations the rights which the self-governing Dominions have acquired. It is significant and important that the Report of the Committee on Inter-Imperial Relations of 1926 specifically excludes India from the operation of the agreements it enshrines. The Committee speak of 'the important position held by India in the British Commonwealth'; but go on to say that 'where . . . we have had occasion to consider the position of India, we have made particular reference to it.'<sup>1</sup> And the references they make are in fact both few and unimportant.<sup>2</sup>

India, then, will some day be a self-governing Dominion; what is said in the succeeding chapters will then apply to her as it applies to Canada, Australia, and the rest. But it does not apply to-day.

Which, then, are the Dominions whose international status it is the purpose of this study to review? They are all units in the second of the three categories above described. But they do not include all the seven units of which this second category is composed. Great Britain is not included, for the simple reason that it is not a 'Dominion.' In fact, the position of Great Britain in the Society of States, and the manner in which the British Government can exercise its rights in International Law, have been considerably modified by the new international status which the Dominions have acquired, and by the 'constitutional conventions' of which that status is the result. That this must be so is proved by the simple but vital proposition, of which much must be said in this book, that the Dominions are now equal in status with the Mother Country. It follows from that proposition that much, if not all, of what is

<sup>1</sup> Report, § 3. Cmd. 2768 (1926), p. 15.

<sup>2</sup> Cf. Keith, *Responsible Government*, 1928, ii. p. 1231.

said in the succeeding pages applies to Great Britain quite as fully as it does to the Dominions. But none the less Great Britain is not a Dominion; she is not, like each of the Dominions, a new person emerging into the Society of States, with developing rights and duties. It is more convenient, therefore, to confine this study, in form at least, to the international position of the Dominions proper.

Newfoundland is also excluded, but for a different reason. Newfoundland is Great Britain's oldest colony; she is self-governing; she is admitted to Membership of the Imperial Conference on an equal footing with Canada and Australia; she controls her own internal affairs as they do. Yet, though it may be by her own choice, the fact remains that she does not herself conduct or control her own international relations as the other Dominions do;<sup>1</sup> she is not, as they are, a Member of the League of Nations, and it is at least doubtful whether, if she applied for Membership, she would be elected; most significant of all, she is not placed by the Imperial Conference of 1926 on a footing of equality with the other Dominions in the draft model form for international treaties which it prepared.<sup>2</sup> The conclusion cannot be resisted: Newfoundland has not the same international position as the other Dominions which it is the purpose of this study to discuss.

These Dominions, therefore, are the remaining five in the second of the categories above described: the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and the Irish Free State.

<sup>1</sup> Cf. Sir C. J. B. Hurst, *loc. cit.*, p. 6: 'If Newfoundland looks to the Mother Country to a greater extent than do some of the other Dominions for the control and the conduct of her relations with foreign

Powers, it is only because she chooses that path for herself—not because she is forced or bound to do so.'

<sup>2</sup> Cf. *infra*, pp. 401-2. Cmd. 2768 (1926), p. 29.

The fundamental facts about the political position of these Dominions, it has been said, are, first, their continued union through their common allegiance to a single Crown; and second, their nationhood. It is from these political facts that their peculiar international legal status has resulted. It is necessary, therefore, to explain and to define what is meant by this continued union and this nationhood. It will be convenient to begin with nationhood. 45

The Dominions are nations. That is a fact, and a fact beyond dispute. That fact alone explains their past constitutional evolution, their present political position, their status in fact and in law in the international system of the world. Not only is that the fact, but the fact is recognised; it is incessantly declared by British and Dominion statesmen in their public declarations and by British and Dominion Governments in their official documents and acts that the Dominions are nations. The phrase, 'the British Commonwealth of Nations,' has been elaborated, explained, and reiterated until it has acquired a complete technical and constitutional meaning of its own.

But what is that meaning? the international lawyer must inquire. How is the word 'nation' intended to be understood by Governments and statesmen when they use it of self-governing Dominions that are parts of the united British Empire?

The answer is that they intend it to be understood in the fullest and the most strictly political sense that the word 'nation' can be made to bear. They do not use it, as some international lawyers with doubtful wisdom have done, as an ethnological expression.<sup>1</sup> They do not mean, when they speak of 'the Canadian nation,' what was meant by writers who spoke of 'the Polish nation' before the Polish State was re-estab-

<sup>1</sup> *E.g.* Fauchille, *Droit international public*, tome i<sup>re</sup>, 1922, p. 4.

lished in 1918. Nor could the Dominions be accurately described as nations in the ethnological sense. The population both of Australia and of New Zealand, it is true, is nearly 98 per cent. Anglo-Saxon. But more than a quarter of the population of Canada is French by race and language; nearly half the white population of the Union of South Africa is Dutch; the Irish are very largely Celtic. These facts are of vital practical importance both in the domestic politics of these Dominions and in the Imperial politics of the Empire as a whole, as any one who has studied them is well aware. But they also serve to make it certain that when the Dominions are described as nations, it is not of their racial character that people think. Plainly, this very lack of ethnic unity increases the political significance of the nationhood which the Dominions are declared to have.

But, it may be asked, even if British statesmen have made a practice of using the word 'nation' in its strictest political meaning to describe the Dominions, have they not in so doing been guilty of an abuse of language? Can the word properly be used of the Dominions as it is used of the other political communities of the world?

An answer to this question may perhaps be found in the most famous discussion in the English language of the true significance of nationhood. In 1861 John Stuart Mill published his *Considerations on Representative Government*, the sixteenth chapter of which is entitled 'Of Nationality, as connected with Representative Government.' In that chapter Mill has occasion to define precisely what he means by a nation, and the causes which in his opinion create the sentiment and the reality of nationhood in any people. These definitions have the greater interest for the present purpose, because Mill, as he shows in his discussion of Colonial

Government' in a later chapter, had no conception that the self-governing British Colonies overseas could then or ever be described as separate nations.

'A portion of mankind,' he says, 'may be said to constitute a Nationality, if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves, exclusively.'<sup>1</sup>

There are thus, according to Mill, three elements in nationality: conscious common sympathies, a willingness to co-operate in the same governmental system, a desire to be governed by themselves alone. No one who knows either the political history or the present-day political life of the Dominions would dispute that their peoples exhibit all these three elements in a marked degree.

As for the element of conscious common sympathies, the 'national' feeling of the individual citizens of a Dominion is without question the dominant fact in their political outlook. A Canadian is a Canadian first and always; the fact that he is also a British subject is important but definitely secondary in his mind.<sup>2</sup>

Of the willingness of the citizens of each Dominion to co-operate in the same governmental system, the existence of their 'national' political institutions is proof enough. This proof is made the stronger by the

<sup>1</sup> J. S. Mill, *Representative Government*, Peoples' ed., 1926, p. 120.

<sup>2</sup> A shrewd observer, Professor Arnold Toynbee, goes even further: '... It was probable,' he says, 'on the face of it, that the farther Australia and the other self-governing Dominions of the British Empire

developed, the more strongly pronounced would become their national individuality. Psychologically, not only Australia but Canada ... had already evolved a distinctive national type.' *The Conduct of British Empire Foreign Relations since the Peace Settlement*, 1928, p. 41.

fact that these institutions were in four Dominions built up by the voluntary confederation of a number of separate political communities, each of which previous to confederation had already by itself acquired self-government; that these confederations were carried through on the sole initiative and by the determined and persistent efforts of the citizens of the Dominions themselves; that while these confederations were being made, the same peoples that were creating them refused consistently and rigidly the repeated propositions for the Imperial federation of the Empire as a whole that were put forward by the British Government and others.

This last fact is a proof also of their desire to be governed by themselves alone. Of that desire a thousand examples could be given; the whole political history of the Dominions is indeed nothing but continued and almost perpetual assertion of this passion for exclusive and complete self-government.

In his discussion of Nationality, Mill is not content with a mere definition. He explains too the causes which in his opinion create these elements of national feeling in the consciousness of any people. National feeling may be generated, he says, 'by various causes. Sometimes it is the effect of identity of race and descent. Community of language and community of religion greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past.'<sup>1</sup>

In some of the Dominions identity of race and descent, community of language, community of religion, have been powerful factors. In others, as has been men-

<sup>1</sup> *Loc. cit.*, p. 120.

tioned, they have not. In all of them 'geographical limits' have played an important part. Each Dominion has a territory that is precisely delimited and defined; a territory which now includes all the British territory under self-government within its geographical region;<sup>1</sup> a territory which is recognised as belonging exclusively to itself, and which is free from control by any authorities other than its own. The Dominions only secured these territorial rights after a certain struggle; Lord Durham, when he proposed self-government for Canada,<sup>2</sup> also proposed that all unoccupied British lands in North America should remain in the hands and under the jurisdiction of the Government in London. It was not long before the new autonomous Canadian Government persuaded the London Government that such a restriction of their growth and freedom was impossible to maintain. The Dominions thus secured a united, continuous, expanding, and undisputed territorial jurisdiction of their own, and this fact, no doubt, has been a powerful force in the creation of their national feeling.

But 'strongest of all,' to use Mill's words, has been the 'identity of political antecedents; the possession of a national history, and consequent community of recollections.' Every Dominion has had a long political history, in which its people, whether as the citizens of one colony or of several that have subsequently joined, have built up the body of common recollections, of corporate memories of public struggles, defeats and victories; in which its people by their determined and persistent efforts have created the colonial and the national, the provincial and the federal systems of governmental institutions under which they live. In their struggles Canada at all stages has been

<sup>1</sup> Newfoundland and S. Rhodesia constitute exceptions to this statement.

<sup>2</sup> Cf. *infra*, Chap. III.

the leader ; 'but they have all except Ireland had much the same kind of development. Ireland's political struggles, indeed, were different, though calculated to evoke the national feeling in a still more intense degree. But the others, Canada, Australia, New Zealand, and South Africa, have all had a very similar constitutional evolution.

They began—in some of their constituent Colonies, at least—with the system of Crown Colony government ; their constitutions did not differ in essentials from the autocratic system under which many British Crown Colonies and Protectorates are administered to-day. They passed through that stage to the second stage of what is now called 'representative government,' under which the authorities in London retained absolute control over the executive administration of the Colonies, while at the same time a popularly elected Legislative Assembly controlled the legislation and voted the budget with which the executive administration had to work. It will readily be seen that under such a system conflicts between the Executive and the Legislature were certain to occur ; and in fact during the whole half-century and more for which representative government endured in Canada, there were continual struggles between Canadian Radicals and the Governors-General and their staffs, who were instructed and supported by the Government in London. Ultimately these struggles culminated in open rebellions ;<sup>1</sup> and although these rebellions were easily suppressed, it became evident that unless some change were made the Canadian Colonies would suffer the same fate as thirteen other British Colonies had suffered half a century before. The British Government therefore sent Lord Durham on his famous mission ; Lord Durham recommended (in 1839) the transformation of 'representative' into 'responsible'

<sup>1</sup> The rebellions of MacKenzie and Papineau in 1837-8. "

government, under which the people of Canada should choose not only their Legislature but their Executive Government as well. After nearly ten years' further discussion and debate, Lord Durham's plan was carried into effect; no new constitution was drawn up, nor even required; by a simple despatch the Governor-General was instructed to entrust power to Ministers who would command the confidence of the Assembly. In this way the great struggle for Dominion autonomy was won; once granted in Canada, it could not long be refused in Australia, New Zealand, and South Africa.

The stage of responsible government was followed, naturally, and indeed inevitably, by a movement for the confederation of the different Colonies in any region to which self-government had been given. This movement met, of course, like all movements for confederation of separate existing political units, with vigorous opposition; but it was no less vigorously pressed. It succeeded after varying periods of time in different places: in Canada in 1867, in New Zealand in 1877, in Australia in 1900, in South Africa only in 1908. Everywhere it created a very active and intense political debate; everywhere it was plainly an important stage in the growth of nationhood.

It was followed by the final stage in the development of the Dominions, what has been called the stage of growth to Equal Status. Of that stage more will be said in the succeeding chapter; for the present purpose it is enough to say that it too has provided incidents, victories, and defeats for the Dominions, that have gone to make up their common stock of political history and political memories, and so to create the sentiment of nationality that they exhibit so strikingly to-day.

As long ago as 1866, Lord Norton, then Under Secretary of State for the Colonies, declared that 'the normal current of Colonial history is perpetual assertion of the

right of self-government.'<sup>1</sup> With every 'decade' that has passed since then his dictum has become increasingly true. The perpetual assertion of the right of autonomy has, moreover, created in the minds of their peoples and politicians an active consciousness of the place of the Dominions in the system of the world. It has created a conscious demand for the status of nationhood. 'Canada a nation' has been for long a battle-cry in the politics of that Dominion which in constitutional development has always led the way. 'Canadian leaders, like the leaders of the other Dominions, have sought not only governmental freedom but national 'personality' for their people.'<sup>2</sup> Thus those who study the history of their efforts cannot doubt that it has been the political history of the Dominion peoples, more than all other causes, that has made them nations.

Not only are the Dominions nations by all the tests of nationhood that are commonly applied, but the recognition that they are nations is the foundation on which the present system of the British Empire is built up. On no other basis can the political life and the constitutional fabric of the 'Commonwealth' be explained.

The following facts demonstrate the truth of this assertion:

First, the Dominions have been allowed to have all the outward marks of corporate 'personality' which other nations have.

Thus:

(i) Each Dominion has its own separate national flag. True, in some of these flags the Union Jack of Great

<sup>1</sup> Cited by Porritt, *Fiscal and Diplomatic Freedom of the British Overseas Dominions*, p. 189.

<sup>2</sup> Cf. statement by the Prime Minister of Canada, Mr. Mackenzie King, on September 19, 1927, on the occasion of Canada's election to the Council of the League of Nations:

'Our election to the League of Nations Council this time implies not only a definite recognition of our individuality as a nation, but I think it may justly be regarded as an indication of the high esteem in which Canada is held by the other Member-States of the League.' *Times*, September 20, 1927.

Britain is the principal element in the design ; but in the Irish Free State flag the Union Jack does not appear at all, while there has only recently concluded in South Africa a keen debate as to whether it should wholly disappear from the Union ensign.<sup>1</sup> ..

(ii) Each Dominion has its own separate coinage and monetary system. In some Dominions the denominations and superscriptions of the currency much resemble those of Great Britain ; in Canada, for sound economic reasons, they are completely different from those of Great Britain, but very similar to those of the United States. So also the Irish Free State coinage is entirely different from that of Great Britain.

(iii) Each Dominion has its own separate postage stamps ; most of these stamps bear the image of the King ; the Irish stamps, however, do not.<sup>2</sup>

(iv) Every Dominion is free to have its own army and navy. In fact, every Dominion does maintain an army of some kind ; whether the force be relatively great or small in number, it is subject to the exclusive control of its Dominion Government. Only Australia maintains a navy of any size ; but the importance of this navy from the present point of view is great, because its creation was a striking proof of national feeling. For many years the British Admiralty sought to persuade the Dominions to make financial contributions to the cost of the Imperial navy. Some of the Dominions, including some of the Australian Colonies, on occasion did so, but Canada consistently refused ; and in the end it was as the result of an uprising of opinion against what was denounced as ' hired defence,' and of reaction against British pressure, that Australia began to make her separate fleet.<sup>3</sup>

<sup>1</sup> The Irish Free State flag is a tricolour. The rules concerning the flying of flags on Government buildings, Dominion ships of war, Dominion merchantmen, and by Dominion military forces, vary in different Dominions, and have in part been settled by agreement between the Governments of the Dominions and the Imperial Govern-

ment. These rules in no way diminish the national character of the Dominion flags. For details cf. Keith, *Constitution, Administration, and Laws of the Empire*, pp. 41-2.

<sup>2</sup> Cf. Keith, *loc. cit.*, p. 42, n. 2.

<sup>3</sup> Cf. Hall, *British Commonwealth of Nations*, pp. 101-3, 107, 109-111, 129-33.

(v) Every Dominion is also free to have its own Foreign Office. In fact, most of them have had at least a skeleton department for a considerable time. The Australian 'Department of External Affairs' was created in 1908; the Canadian Department, under the direct control of the Prime Minister, in 1912; the Irish Department in 1922; the South African Department in 1927.

Second, the constitutional status of the Dominions within the Imperial system is founded on the recognition of the fact that they are nations. The fundamental fact about this constitutional status is that the King is not only King in Great Britain and Northern Ireland, but King also in Canada, in Australia, and the rest. As King in Canada he has a special character or 'right.'<sup>1</sup> Were this doctrine not recognised and accepted, the present constitutional arrangements of the Commonwealth would be impossible to explain. Juridically, it is true, it has sometimes been disputed; politically it has never been disputed since 1907, when in the Imperial Conference Sir Wilfrid Laurier protested against the British Ministers' reference to themselves as 'His Majesty's Government,' and exclaimed: 'We are all of us "His Majesty's Governments."' <sup>2</sup> It is because this doctrine is accepted that the King, in the message which was referred to above, spoke of 'my people of Canada,' and that in the King's Speech to the Parliament of Great Britain on November 6, 1928, he spoke of the Kellogg Treaty for the Renunciation of War as having been signed 'by plenipotentiaries on

<sup>1</sup> N.B.—This does not amount to saying that the Crown is divided, for 'the Crown in the British Empire is one and undivided.' *Vide infra*, pp. 213 *et seqq.* and pp. 349 *et seqq.*

<sup>2</sup> Sir W. Laurier completely gained his point, for the Resolution adopted in 1907 formally establishing the Imperial Conference contained the

following words: '... the Imperial Conference . . . at which questions of common interest may be discussed and considered as between His Majesty's Government and His Governments of the Self-governing Dominions beyond the seas.' Cited by Hall, *British Commonwealth of Nations*, p. 115.

*behalf of all My Governments.*'<sup>1</sup> His people of Canada are a separate political community, and as such constitute a nation of which he is in a special capacity the King; his constitutional relation to them, and their constitutional relation to the other Dominions; depend, and are recognised to depend, upon that fact.<sup>2</sup>

Third, the practical governmental and political co-operation of the Dominions among themselves, and of the Dominions with the Mother Country, is founded on the recognition of the fact that they are nations. That co-operation has its most complete expression in the institution of the Imperial Conference. It would be difficult to exaggerate the importance of the Imperial Conference in the system of the British Commonwealth at the present time; although its development has been so recent, it would probably be true to say that without the Conference the Empire would have a perpetual tendency to fall apart.<sup>3</sup> But everything about the Imperial Conference—its history, its constitution, its methods of work—proves that the Dominions are nations in the fullest political sense. As an institution it evolved from a protracted series of negotiations in which the Mother Country repeatedly proposed Imperial Federation, and in which the Dominions consistently refused it. They refused it on the specific ground that they were unwilling to merge their separate political communities in a larger whole. To such a point did they carry their resistance to federation—their attachment, that is to say, to separate nationhood—that at one time many liberal thinkers, both in Great Britain and the Dominions, believed their complete separation from the Empire to be the sole solution that would work.<sup>3</sup> These thinkers were proved wrong, but

<sup>1</sup> *Times*, Nov. 7, 1928.

<sup>2</sup> Cf. especially the influence of the Conference of 1926 on the attitude of the Government of South

Africa; *vide infra*, Chap. V., and Toynbee, *loc. cit.*, pp. 21-2.

<sup>3</sup> This was also a common doctrine among Radicals at an earlier stage

only because a new method of inter-governmental collaboration was evolved. That method, sometimes called for short 'co-operation,' was the exact antithesis of federation; it consisted in the joint voluntary consultation of equal Governments, none among them being able to oblige any of the others to accept its will, none being able to take executive action of any kind on the territory of the rest, results depending wholly on the voluntary execution, by parallel and simultaneous administrative or legislative action, of the decisions to which they had unanimously agreed. That method is the method of the Imperial Conference. The Members of the Conference are equal in standing; they cannot be coerced by a majority vote; they are free to propose, accept, or reject any policy they choose; they are delegates of, and solely responsible to, their own Parliaments at home; their Governments are free to carry out or not the decisions to which in the Conference they may collectively agree.<sup>1</sup> But it is the method also of

in Imperial history. They all agreed that federation was impossible, owing to the obstacles which geography imposed—*opposita natura*, as Burke had said. Not foreseeing the method of co-operation, they regarded separation as inevitably the ultimate solution. The point was well expressed by Sir F. Rogers, for many years Permanent Under Secretary of State for the Colonies (*vide* Egerton, *History of British Colonial Policy*, pp. 367-8: extract from 'Zenith and Decline of Laissezaller'): 'I had always believed—and the belief has so confirmed and consolidated itself that I can hardly realise the possibility of any one seriously thinking the contrary—that the destiny of our Colonies is independence, and that in this point of view the function of the Colonial Office is to secure that our connection, while it lasts, shall be as profitable to both parties, and our separation, when it comes, as amicable, as possible.'

<sup>1</sup> Cf. speech by Sir R. Borden, quoted in the War Cabinet Report, 1917, pp. 8-9: 'We meet there as equals . . . ministers from six nations sit around the Council Board, all of them responsible to their respective Parliaments and to the peoples of the countries which they represent. Each nation has its voice upon questions of common concern . . . each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its own ministers to their own electorate.' Cf. also General Smuts in the Union House (*Times*, June 26, 1920), cited by Hall, *loc. cit.*, p. 250. Cf. also Sir C. Hurst, *loc. cit.*, p. 36: 'Voting, if there is any, takes place by Governments; but . . . there is no voting in the sense that questions can be decided by a majority. The Conference works on a purely consultative and advisory basis; it has no power to bind a single Government or Parliament.'

the League of Nations, a method voluntarily accepted by the 'sovereign states' which compose the League. The Imperial Conference has no more sovereign authority over the Dominions than the Council of the League has over the states that are its Members; it is no more the agent of a super-state than is that Council; indeed, under the Covenant the Assembly and the Council have such extensive powers that it would be possible to argue that the Imperial Conference has *less* authority over its constituent units than have these organs of the League.<sup>1</sup> Could there be more striking evidence of the fact that the British Empire system is founded, as was said above, on the fullest recognition of Dominion nationhood?

Fourth, and last, this recognition of their nationhood has now been formally declared in the most solemn way. It is many years since the word 'nation' was first applied to a Dominion; it is ten years since the modern constitutional phrases, such as the 'British Commonwealth of Nations,' first came into use. But it was only in 1926 that the political standing of the Dominions was formally defined. In the Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, the following sentences appear:

'Their position and mutual relation' (*i.e.* the position and mutual relation of Great Britain and the Dominions) 'may be readily defined. *They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*'<sup>2</sup>

<sup>1</sup> Cf. the judicious comparison between the Commonwealth and the League of Nations made by Toynbee, *loc. cit.*, pp. 18 *et seqq.* Also especially his remarks on the

rule of unanimous decision, *ibid.*, p. 23.

<sup>2</sup> Cmd. 2768 (1926), p. 14 (original italics).

This definition is further annotated in the following way :

‘Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.’<sup>1</sup>

And again :

‘Every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation’ (with the other units of the British Commonwealth).<sup>1</sup>

It would surely be difficult to compose a better or more comprehensive definition than that which these sentences contain of the rights and qualities required to constitute political nationality of the most effective kind. In their most solemn constitutional declaration, therefore, the British peoples have recognised as the foundation of their Imperial system Dominion nationhood in its completest form.

It is fair to conclude from the facts which have just been discussed that when British statesmen or Governments speak of a Dominion as a nation, or when they use such phrases as the ‘British Commonwealth of Nations,’ they give to the word ‘nation’ substantially the same political and constitutional sense that it has in such a phrase as ‘International Law’ or the ‘League of Nations.’ In so doing they are faithful to the facts, for the Dominions in reality have the political, moral, and social qualities that characterise a nation. They have these qualities, moreover, in as great degree as any of the other subjects of International Law, or any of the other Members of the League. Indeed, they have them in a much greater degree than some communities that are always formally admitted to be ‘sovereign states.’ A vivid and constant appreciation of these facts is essential to the intelligent discus-

<sup>1</sup> Cmd. 2763 (1926), p. 14.

sion not only of the political position of the Dominions, but also of their legal status in International Law.

At this point a digression may be made to discuss why the development of the Dominions to the standing of nationhood has been so rapid. When Mill wrote his *Representative Government*, no one spoke or thought of them as such. Even twenty years ago the word was not in general use. Why has so great a change occurred in so brief a period of time? The explanation lies in great part in the following statistics of the distribution of the white population of the British Empire:

WHITE POPULATION IN MILLIONS (to nearest 10,000)

	Great Britain.	Canada.	Australia.	S. Africa.	New Zealand.	Ireland.	Total outside Great Britain.
1851	27·000	1·800	0·440	0·200	0·020	....	2·460
1925	45·200	9·400	5·990	1·600	1·415	2·923	21·328 <sup>1</sup>

These statistics show that in 1851 the overseas white populations were together less than one-tenth of the whole white population of the Empire; whereas to-day, if the three million inhabitants of the Irish Free State are counted, they are almost a third. Some of the individual Dominions have a population far larger than that of many long-established independent states. Since the effective political control of the whole Empire, which rules a quarter of the human race, is in the hands of its white population, it is only natural that the power and position of the Dominions in the Imperial system should have increased with the increase in the number of their citizens.

<sup>1</sup> The figures for 1925 are taken from the *L.N. International Statistical Yearbook*, 1926.

Nor are these statistics useful only to explain the past. The population of the Dominions is still increasing far more rapidly than the population of the British Isles. To begin with, the increase due to natural causes is more rapid. The Dominions have the lowest death-rate in the world: New Zealand, 8.3 per thousand; Australia, 9.2; South Africa, 9.5; Canada, 9.7. The excess of births over deaths in South Africa (for whites only) is 17.1 per thousand; in Australia, 13.7; in New Zealand and Canada, 12.9. The excess of births over deaths in England and Wales, on the other hand, is only 6.1.<sup>1</sup> Moreover, in addition to this greater increase due to natural causes, the Dominions receive through immigration continual additions to their population which the Mother Country does not receive. Thus in 1923 Canada admitted 113,358 immigrants; in 1924 the number was 93,854.<sup>2</sup>

It must, therefore, be foreseen that by 1961 the Dominions will have among them a greater white population than Great Britain, and that by then Canada will have a people that will number not less than twenty-five millions at the least.

These figures concerning the past and present growth of the population of the Dominions no doubt do much to explain the rapid development of Dominion constitutional status in recent times. They also make it certain that the Dominions will continue to play an even more important part than hitherto in the affairs both of the Empire and of the world. As has been said, it is its white inhabitants who control the Empire, and with the redistribution of white population political power must inevitably be more diffused. It is perhaps the consciousness of this fact that explains the

<sup>1</sup> Documentation of the International Economic Conference, May 1927: Memorandum on the Natural

Movement of Populations, C.E.I. 4 (1), pp. 6-7.

<sup>2</sup> *Ibid.*, C.E.I. 25, p. 12.

following sentence in the Imperial Conference Report of 1926 :

‘ It was frankly recognised that in this sphere ’ (general conduct of foreign affairs), ‘ as in the sphere of defence, the major share of responsibility rests now, *and must for some time continue to rest*, with His Majesty’s Government in Great Britain.’<sup>1</sup>

The words ‘ must for some time continue to rest ’ are significant in the extreme. It would have seemed unthinkable to a responsible British statesman even twenty years ago that they should be seriously used. For they foreshadow clearly the time when ‘ the major share of responsibility ’ in these grave matters may have passed from British to Dominion hands. No further argument is surely needed to show that, when the legal status of the Dominions is considered, their brilliant political future must be constantly in mind. They are not only nations, they are destined to be ‘ mighty nations ’ before many generations have passed away. That fact alone ought to infuse a vivid interest into what otherwise might seem the weary legal details of their position at the present day.

The first essential and fundamental fact about the political position of the Dominions in the British Empire is their nationhood ; the second is their continued union through their common allegiance to a single Crown.

Of that union not much need be said in this present chapter. Its legal character will be dealt with at a later stage ; its formal and its historical aspects are known to all ; its political significance needs no explanation to those who know the British peoples.

It is enough to say that to the Dominion nations the Imperial connection is no mere formal tie ; on the con-

<sup>1</sup> *Vide* Cmd. 2768 (1926), pp. 25-6. (The italics are mine.)

trary, its strength and force are a vital factor in their national politics and life. And though legally it may have seemed to weaken, the political strength of the Imperial connection is still increasing. At various moments in various Dominions there have been minor movements of opinion in favour of their total independence; apart from Ireland, where recent civil war has left hatreds too bitter wholly to be allayed in so short a space of time, there is no such movement of importance at the present day. The non-Anglo-Saxon elements in the Dominions are almost as powerfully attached to the Imperial connection as those of Anglo-Saxon race. The French-Canadians are more British in their sympathies than the prairie-dwellers of the West; no British statesman has ever expressed the guiding principles of Imperial unity more happily than a French-Canadian leader, Monsieur Lapointe, Minister of Justice in the Canadian Government, in a speech which he made in Paris in 1927. 'Nous sommes loyaux,' he said, 'à notre Roi, à notre pays, à nos institutions, et ces trois loyautés reposent l'une sur l'autre, se soutiennent et se complètent.'<sup>1</sup> General Smuts, who once led an army against Great Britain, has repeatedly declared his people's loyalty to the Commonwealth of which they form a part.

The Imperial Conference of 1926, composed of the Prime Ministers of all the Dominions, including the President of the Council of the Irish Free State and General Hertzog of South Africa, unanimously adopted a farewell address to H.M. the King, which contained the following words:

'We have found in all our deliberations a spirit of mutual goodwill and an earnest desire for co-operation in promoting the prosperity of the several parts of the Empire. The foundation of our work has been the sure

<sup>1</sup> At the Cercle Interallié, Paris, July 1, 1927.

Knowledge that to each of us, as to all your Majesty's subjects, the Crown is the abiding symbol and emblem of the unity of the British Commonwealth of Nations.' <sup>1</sup>

This was not empty rhetoric. The sentiment of British unity, the power of the common traditions and common standards of free government and just administration of which that sentiment is the result, alone explain the cohesion of the Commonwealth at the present day. They alone explain how six separate Governments, 'in no way subordinate one to another,' can work together with no more elaborate machinery than that of the triennial meetings of the Imperial Conference. They alone explain why these Governments, and the peoples whom they represent, are willing to make sacrifices, and sometimes great sacrifices, of their national interests to the common welfare of the greater whole. It is this sentiment of Imperial unity, this political force of common feeling, these moral bonds that link the British peoples, which give reality and power to the ties of legal union which still subsist. This sentiment of their overriding union, no less than the nationhood of the Dominions, is a fundamental fact of the Imperial system, and a fact which it is essential to remember when the legal problems of Dominion status are discussed.

<sup>1</sup> Cmd. 2763, p. 60.

## CHAPTER III

### THE DEVELOPMENT OF DOMINION RIGHTS IN THE SPHERE OF INTERNATIONAL AFFAIRS

It was natural that the nationalism of the Dominion peoples should be directed first and foremost to the problems of their domestic life. The creation and the development of their free and democratic institutions, the economic exploitation of the limitless natural resources which were under their control, were tasks vast enough to absorb for long their attention and their strength. But it was always certain that in time they would turn their attention to external problems too. That was an inevitable result of the grant of self-government to a highly-organised community of civilised men. 'There are no limits to freedom,' it has been said; and the scope of action of the Dominion Governments, once they were established, could no more be restricted than the growth of the oak can be restricted when the acorn has been planted in the soil.

The pioneers of self-government for the British Colonies recognised that this was true. But they also foresaw the grave difficulties that would arise when the time arrived for the British Government to share with other Governments overseas its control over foreign policy, and they determined therefore to neglect for their immediate purpose problems which might not for generations become of much practical importance. They were justified by subsequent events. Before Lord Durham went to Canada in 1839, to write his great Report, Canadian Radicals had already demanded,

not only internal freedom, but a share also in the control of foreign affairs. Lord Durham completely disregarded their demands, and proposed that foreign policy should remain entirely in the hands of British Ministers at home. His proposal was adopted, and it was not for many years, not until confederation had been effected and the constitutional stage called 'growth to equal status' had begun, that questions of external policy began to interest Dominion leaders.

It will be useful to examine for a moment the restrictions on self-government which Durham actually proposed. These are some sentences from his Report :

'Perfectly aware,' he wrote, 'of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connection with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the Mother Country. The matters which so concern us are very few. The constitution of the form of government—the regulation of foreign relations, and of trade with the Mother Country, the other British Colonies, and foreign nations—and the disposal of the public lands are the only points on which the Mother Country requires a control. A perfect subordination on the part of the Colony on these points is secured by the advantages which it finds in the continuance of its connection with the Empire.'<sup>1</sup>

Together, Durham's four restrictions constituted a very formidable limitation on self-government. While they were in force, the Colonial Governments were 'subordinate' in 'many aspects of their domestic and external affairs.' But in due course the restrictions were one by one removed; and as they were removed, so the 'equal status' of to-day was progressively evolved.

<sup>1</sup> Report, edited by Lucas, vol. ii. p. 304.

The first to go was the restriction on the right to dispose of public lands. This passed to the Canadian Governments almost immediately after Durham had made his Report, and even before his policy was finally carried out and responsible self-government was granted in 1847. It was natural and inevitable that this should happen; for the right to dispose of public and especially of unoccupied lands is plainly an indispensable element of true internal autonomy, as Durham might have been expected to perceive.<sup>1</sup>

The power to amend the constitution or to change the form of government remained longer in Imperial control. It need not be dealt with here, because it will be discussed in another connection later on; but again it is plain that the right which Durham reserved is in reality an essential element of true self-government, even if that self-government be restricted to internal affairs.

There remain the control of commerce with other countries, British and foreign, and the general conduct of foreign policy. In 1839—and still in 1847—it was believed to be essential to exclude all rights in these matters from the self-government that was granted to the Dominions; the King, it was argued, was already advised concerning them by his Ministers in London, and it was not possible that he should receive advice on the same questions from two separate Governments. Lord John Russell, who was Secretary of State for the Colonies when Durham went to Canada, was a liberal-minded man, but there is a despatch which he dictated, repudiating very strongly the suggestion that self-governing Colonies could have any interest in international affairs.<sup>2</sup> Even Mill as late as 1861 could write

<sup>1</sup> Rights in this matter were transferred to Colonial Governments at the following dates: Canada, 1840; New Zealand, 1852; Australia, 1855; Cape Colony, 1872. *Vide* Hall,

*British Commonwealth*, pp. 32-3.

<sup>2</sup> Despatch dated Oct. 14, 1839. *Vide* Keith, *Responsible Government*, 1928, p. 15.

of the 'inferiority necessarily inherent in the case' which resulted from the fact that the Mother Country must alone decide on questions of peace and war.<sup>1</sup> It was generally believed that these restrictions on Dominion rights not only should, but also could, be indefinitely retained.

In fact, this doctrine resulted from a confusion of thought. It was believed that it was possible to make a rigid differentiation between questions of internal and external policy. But no such differentiation can in reality be made. That can be shown by two examples that have been of much importance in Dominion history. These examples concern the control of immigration and the control of taxation. Both are matters which, in modern language, are by International Law solely within the domestic jurisdiction of a State. Yet both may well involve international relations and even diplomatic disputes of the gravest kind. The truth is that the external relations of a Government result in great measure from the facts and needs of its internal administration, and that the distinction often made between internal and external questions is largely false.

This was rapidly made plain in the history of the Dominions. Self-government was only granted to the Canadian Colonies in 1847; already in 1859 they gained their first great victory in one of Durham's reserved spheres of 'external policy.' This victory was over the control of international trade. In 1859 the Canadian Government proposed to establish a general all-round protective tariff against imported goods. This tariff was to apply not only to goods from foreign countries, but to goods from other British Colonies, and even from Great Britain itself. The manufacturers of England, and especially those of Birmingham

<sup>1</sup> *Representative Government*, p. 133.

and Sheffield, were furious that they should be excluded from, or at least severely handicapped in, a market which they regarded as of right their own. They demanded imperiously that the British Government should support their protest against the Canadian tariff; the British Cabinet, holding as they did that the Canadian action was quite contrary to the constitutional principles which Durham had laid down, agreed to do so, and they endeavoured to persuade the Canadians to withdraw their Tariff Bill.

The Canadian Government, however, adopted an attitude of immovable opposition to this British claim. Their policy was explained in a famous letter written by the Canadian Minister of Finance, Sir Alexander Galt, who was both then and later a powerful figure in Canadian national life. His letter was addressed to the Duke of Newcastle, then Secretary of State for the Colonies. The most important sentences are these :

‘The Government of Canada, acting for its Legislature and people, cannot through those feelings of deference which they owe to the Imperial authorities in any way waive or diminish the right of the people of Canada to decide for themselves both as to the mode and extent to which taxation shall be imposed. The Provincial Ministry are at all times ready to afford explanations in regard to the acts of the Legislature to which they are party. But . . . self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. . . . Her Majesty cannot be advised to disallow such acts (as that imposing the tariff) unless her advisers are prepared to assume the administration of the affairs of the Colony irrespective of the views of its inhabitants.’<sup>1</sup>

<sup>1</sup> The chief documents in connection with this controversy, including the memorial of the Sheffield manufacturers, Newcastle’s despatch

and Galt’s reply, are reproduced in an Appendix to Porritt, *op. cit.* p. 453 *et seq.*

The last sentence was suspiciously like a threat; it reminded British Ministers unpleasantly of the events in other parts of British North America in 1775; and it served to persuade them that they had no choice but to give way. Newcastle withdrew his opposition, and the Queen allowed the Tariff Bill to become law.<sup>1</sup>

This victory of the Canadians was a victory not only over a question of taxation, but over the whole control of trade. From this time onwards the self-governing Colonies were effective masters in another of the spheres of government in which Durham had intended that they should have no powers. Moreover, it was a sphere of government which affected their relations with other countries; and once they had begun to invade the rights of the British Government in respect of external affairs, where, it might well have been asked, would the process end?

In fact, it was not long before their desire to control commercial policy led to other inroads on the British prerogative to control their foreign affairs. If they were free to settle their own tariffs, to determine their own laws about foreign trade, it was inevitable that they would also wish to make their own commercial treaties with foreign Powers. It was intolerable that they should be bound against their will by British treaties, made without their knowledge or consent; it was hardly less intolerable that, when separate treaties were made to meet their special needs, these treaties should be negotiated by British diplomats abroad, who received their instructions from London, and who understood nothing of the needs and wishes

<sup>1</sup> Many English critics thought the Government were wrong to give way. Thus Earl Grey, twenty years after the event, argued that tariffs and commercial policy in general are matters of interest to all parts of the Empire, and he wrote: 'Unless all the Colonies act in concert

and in subordination to the Imperial authority in everything that concerns the general interest, they cannot be said to constitute a real Empire.' Article in *Nineteenth Century*, June 1879, cited by Porritt, p. 457.

of the Colonies for whom they acted. The Colonies thus began to demand the right to be associated through their own representatives in all negotiations for commercial treaties which concerned them. The first occasion on which they obtained some satisfaction was in 1871, when Sir J. Macdonald, the Prime Minister of the new Canadian Confederation, was sent as one of the British delegation to an important Conference in Washington with the United States. Both commercial and other interests of the Canadian people were at stake, and the British Government made bold to try a new experiment for making them content. It was eminently successful; Macdonald obtained results for Canada which certainly would not have been obtained had he not been there. But his private letters written during the Conference, which were subsequently published, reveal two interesting facts. First, the rest of the British delegation held meetings—'caucuses' he calls them—from which he was excluded, and against which he bitterly protests. Second, he had great difficulty in persuading the United States Ministers that Canada was an effective party to the negotiations, and that unless the Canadian Parliament gave its consent the treaty which they were making would not be ratified. The United States Government had been accustomed to regarding the will of Britain as decisive in all colonial affairs; they were reluctant to admit the possibility of change.<sup>1</sup> Thus on this first occasion there were seen the two difficulties against which, up to 1919, Dominion statesmen had so often to struggle when they sought to extend their direct participation in the control of foreign affairs—British hesitation and even mistrust, and the purist diplomatic opposition of foreign Powers.

It would serve no present purpose to describe in

<sup>1</sup> Vide Porritt, *op. cit.*, p. 127.

detail how the Dominions gradually enlarged their privileges in respect of the making of commercial treaties. The controversies that took place at every step were of great importance in building up a new body of opinion alive to the problems of external policy which full self-government must ultimately involve. But of these controversies an adequate account has been already given by Porritt and other authors. Here it will be enough to indicate some of the major steps in the development that took place, and to emphasise the fact that every step was the result, not of accident or chance, but of prolonged discussions, and sometimes of violent conflicts of view, between the British and Dominion Governments, conflicts which in the end were only solved by mutual compromise.

In 1877, then, an agreement was reached between Canada and the Imperial Government—an agreement, of course, at once extended to all the self-governing Colonies—that the commercial treaties made by Great Britain should not automatically apply to Canada. Into every such treaty a clause would in future be inserted giving to the Canadian (or other Colonial) Government the right to accept the treaty within a period of two years from signature, if it desired to do so. This right either to be excluded from or to ‘contract into’ a British treaty was first exercised in connection with a treaty made in 1882 with the now defunct state of Montenegro.

Meanwhile, in 1879, Macdonald had secured the consent of the British Government to the nomination of a special High Commissioner in London, whose duty it should be to assist the British diplomats of the Foreign Office, and of its legations and embassies abroad, to negotiate commercial treaties for Canada. The innovation was important, as subsequent events have shown; but practically it did not meet with an imme-

diate success. For the first Canadian Commissioner who sought to negotiate a foreign treaty met with a humiliating rebuff. Galt, of tariff-controversy fame, was sent to Madrid to make a treaty of reciprocity with Spain in 1879, but unfortunately for him and for his Government the Spaniards refused to see him or recognise his position in any way. 'Galt,' wrote one of his colleagues, 'could do nothing. . . . It was necessary that all his negotiations with the Spanish Government should be filtered through Her Majesty's Minister at the Court of Madrid.'<sup>1</sup>

But Galt was the last Canadian agent to complain of such treatment. He and his successor Tupper, a man of no less character and will, pressed the matter so strenuously with the Foreign Office that in 1884 Tupper secured the full support of the British Government for his claim to take an equal part in Canadian trade negotiations.<sup>2</sup> Henceforward Canadian agents acted personally and directly in such matters for their Governments, though of course in collaboration with a diplomatic representative of Great Britain as well. Thus in 1893 the first strictly Canadian treaty negotiated by a Canadian delegation was made with France, and was signed jointly by the British Ambassador in Paris and by a Canadian Minister. This precedent so much impressed the Colonial Office that they prepared some formal regulations in 1895 laying down the procedure to be followed in the preparation of such treaties in the future.

Another step forward was made in 1899 when the British Government agreed that in future commercial treaties to which Dominions or self-governing Colonies

<sup>1</sup> Cited by Tupper. C. H. Tupper, 'Treaty-making Powers of the Dominions,' *Journal of Society of Comparative Legislation*, New Series, xxxvii., 1917, pp. 7-8.

<sup>2</sup> He recorded in his *Recollections* (chap. ix.) that he 'obtained for Canada the right to negotiate commercial treaties with foreign countries.'

had adhered should contain a clause allowing them to denounce such treaties separately if they so desired. They thus secured a right of 'contracting out' of British treaties to which they had been bound, which completed the right of 'contracting in' which they had previously obtained.

By the end of the nineteenth century it was generally recognised, not only by the British Government but by foreign Powers as well, that the Dominions had a certain diplomatic and political standing of their own in respect of the control of trade and commerce, and in the international relations which resulted from this control. Canada emphasised the fact by instituting a private tariff war of her own with Germany, a war which began in 1898 and was only ended in 1910. But although the control of the Dominions was now effective, it was still subject to many formal limitations. Commercial treaties were never made by a Dominion agent acting alone, but by a Dominion agent assisted at every stage by a British diplomat. When the Colonial Office prepared their regulations on the subject in 1895, they attached great importance to this direct collaboration of the British Government; even the Liberal Cabinet then in power were far from accepting fully the application of self-government in this sphere of international affairs.<sup>1</sup> But in 1907 a further most important concession was made to the Dominions. In that year a Canadian Minister went to Paris, and alone, without the intervention at any stage of the British Embassy, negotiated a new commercial treaty between Canada and France. It is true that this Canadian Minister had full powers prepared by the British Foreign Office; that his treaty, when it was negotiated, was signed jointly by himself and the Ambassador; that it was ratified not by any action of

<sup>1</sup> Cf. p. 63, *infra*.

the Canadian Government, but by the King acting on the sole advice of his British Ministers; and that this ratification was only accorded after the treaty had been carefully examined and approved by the British Board of Trade. But it is also true that the concession of the right to negotiate alone was an important step forward towards Dominion rights in international affairs, and the Canadians warmly welcomed it as such. 'It has long been the desire . . . of the Canadian people,' said Sir Wilfrid Laurier, the Prime Minister of the Dominion, 'that we should be entrusted with the negotiation of our own treaties, especially in regard to commerce. Well, this long-looked-for reform has become a live reality. Without revolution, without any breaking of traditions, without any impairment of our allegiance, the time has come when Canadian interests are entrusted to Canadians; and within the last week a treaty has been concluded with France—a treaty which applies to Canada alone, which has been negotiated by Canadians alone.'<sup>1</sup> This new concession was granted to Canada by a simple despatch from the British Secretary of State for Foreign Affairs, Sir Edward Grey, to the British Ambassador in Paris, instructing him that the Canadian delegate was to negotiate alone with the French Government; but, simple though the procedure may have been, it was none the less regarded by the British Government as a binding precedent, and was automatically extended to all the other self-governing Dominions.

By this time, therefore, the Dominions had obtained very considerable rights in the making of commercial

<sup>1</sup> Laurier at Canadian Manufacturers' Association banquet, Toronto, September 26, 1907; cited by Porritt, *op. cit.*, p. 201 n. Another Canadian Minister, Fielding, who had been at the head of the delegation that had made the treaty,

likewise explained that he and his colleagues had had complete and ultimate control of the whole negotiation, 'with the certainty that all we did would be ratified' by the King. Cited by Porritt, *ibid.*

treaties. But the concessions which had been accorded to them had not as yet made any breach in what is sometimes called the 'diplomatic unity' of the British Empire. Dominion plenipotentiaries held their powers from the King; they acted always and exclusively in his name; and in no negotiation had there ever been more than one single British delegation in contact with the representatives of foreign states.

But in another sphere of international relations, the sphere of what are now known as 'technical questions,' other developments in Dominion status soon occurred, and as a result a certain breach in this diplomatic unity was made. In 1906 the Dominions sent separate delegations to the International Congress of the Universal Postal Union. It was, of course, right and natural that they should; they had wholly separate Dominion postal systems, under the exclusive control of their own Governments; it was really impossible for the British Post Office to represent them, or adequately to put forward their wishes and their needs. Moreover, the Universal Postal Union was considered to be so 'technical' as hardly to impinge on the sphere of foreign affairs at all. But the precedent thus created was soon followed in other spheres. In 1911 the Government of the United States summoned a Conference to revise the International Convention on the Protection of Industrial Property, and they invited Canada, through the British Ambassador and the Governor-General, to send a separate delegation. The invitation was accepted, but the Canadian delegates did not in fact sign the amended Convention that was made, because their Government disapproved of its provisions. But a year later, in 1912, not only Canada, but Australia, New Zealand, and South Africa, all sent separate delegations to an International Conference on Radio-Telegraphy; and again in 1914, at a Conference

on the Safety of Life at Sea, they did the same, and on both of these occasions the Dominions' delegates signed on behalf of their respective Governments the treaties that were made.

It is true, of course, that these delegations all received full powers prepared by the British Foreign Office for the King, and that the British Government retained the right to refuse to ratify on their behalf the treaties which they signed. But it is also true that they were instructed, not by the Foreign Office but by their Governments at home, that they were free to oppose the views put forward by Great Britain if they so desired, and that they could at least sign, irrespective of British wishes, any instrument of which their Governments might approve. These pre-war conferences must be counted, therefore, as an important milestone in the development of Dominion status, and as an important precedent for the events that followed the Great War.

But this progressive acquisition of rights to participate in treaty-making and to do so through their own separate Dominion delegations was rigidly confined before the Great War to the sphere of commercial and technical relations. In the general political questions which used to be considered to constitute all that is important in international affairs they had no rights and hardly any status of any kind. It is true that as early as 1856 the Imperial Government had given a pledge to the Government of Newfoundland that they would be 'consulted' in any foreign questions in which Newfoundland interests were involved. In accordance with other precedents, this pledge was held to apply equally to all Dominions. But from 1856 until 1914 the narrowest possible interpretation was always placed upon the phrase 'Dominion interests.' In the fifteen years before the War broke out, the Anglo-Japanese Alliance, the Franco-British Entente, and the various

Conventions of the First and Second Peace Conferences at The Hague were all concluded by the Imperial Government. Every one of them affected the vital interests of the Empire as a whole, and therefore of the self-governing Dominions; but concerning none of them was any of the Dominions consulted in any way. Still less was there any thought that the Dominions might be permitted to contract out of the obligations of these political treaties, as they had been for so long allowed to contract out of the commercial treaties which the British Government made. For long after self-government had been established; in fact, it hardly ever crossed the mind of any responsible person that since the Dominions were inevitably partners in the results of British foreign policy—since, for example, they were inevitably liable to suffer if Great Britain went to war—they had a right to be partners in the preparation of that policy as well.

But in the early years of the twentieth century there came a certain movement of opinion and events which gave them at least the rudimentary beginnings of a right to make their voice heard, even in questions of general political importance to the Empire as a whole. The creation of separate Dominion navies was one symptom of that movement. Another was the repeated repudiation by the Dominions, and especially by Sir Wilfrid Laurier, of any obligation on the part of the Dominions to give military assistance to Great Britain in time of war unless their Parliaments should desire to do so. They admitted that if Great Britain was at war they must by International Law be 'automatically' belligerents as well. But they did not admit that this involved any duty, legal, political, or moral, to act as 'active' belligerents on the British side. Sir Wilfrid Laurier repeatedly stressed the point at the Imperial Conference of 1907. Even more important,

they began to voice their interest in international political conventions, and at the Imperial Conference of 1911 they made a formal protest against the signing of the Declaration of London without their previous consent. They argued that some of them had navies of their own, that the Declaration affected vitally every country with naval interests, and that therefore they had a right to be consulted before its provisions were drawn up. Nor did they restrict their protest to the Declaration of London. 'We shall press upon you,' said Mr. Fisher, the Prime Minister of Australia, speaking both for his other Dominion colleagues and for himself, 'that it would be advisable for you, whenever possible, at any rate in important matters which concern us, . . . to take us into your confidence before committing us. It is not sufficient for you to make a good treaty affecting us, and then to tell us after it has been made.'<sup>1</sup>

This was equivalent to a demand, formally put forward in the Imperial Conference, for full consultation on all important issues in foreign policy—for what important issue was not 'a matter which concerned' the Dominions? For this demand they did not by any means receive full satisfaction from the British Government. But they did receive a certain measure of satisfaction. The Foreign Secretary, Sir Edward Grey, did promise, in reply to Mr. Fisher's specific point, that he would consult the Dominion Governments in future, so far as it was practicable to do so, on all important questions involving the acceptance of new international obligations. He also inaugurated the practice, which has continued ever since, of making a general statement in the Imperial Conference on the international situation, of describing the principles by which his

<sup>1</sup> *Vide* Cmd. 5745 (1911), p. 97. Keith, *Responsible Government*, 1st ed., 1912, vol. iii. p. 1513 *et seq.*  
For an account of the discussion *vide*

foreign policy was inspired, and inviting its members to express their views. Moreover, he gave substance to his pledges by forthwith submitting to them the question of the renewal of the Anglo-Japanese Alliance, which came up for reconsideration in that year. The Conference unanimously approved Grey's proposal that the Alliance should be renewed, and the Anglo-Japanese Agreement was thus the first international political treaty to be accepted by each of the Dominion Governments.<sup>1</sup>

These concessions by Sir Edward Grey were of evident importance, and they were warmly welcomed by the Dominion statesmen. Mr. Fisher again voiced their general feeling when he said: 'You have thought it wise to take the representatives of the Dominions into the inner counsels of the nation, and frankly discuss with them the affairs of the Empire as they affect each and all of us. . . . I think no greater step has ever been taken, or can be taken, by any responsible advisers of the King. I hope, as I feel, that there will be no going back on that sound principle.'<sup>2</sup> It is plain that the Imperial Conference of 1911 did much to prepare the way for the disappearance of the old conception that the Dominions could have no interest or rights in foreign policy.

There were one or two other practical applications of the new ideas before the War which must be mentioned. The first was the exemption of the Dominions—the first of its kind—from the operation of the Arbitration Treaty made by Great Britain with the United States in 1908. It was expressly provided that this treaty should not cover disputes in which the interests of a Dominion were involved, unless the Government of that Dominion gave its express consent. Another

<sup>1</sup> Keith, *Imperial Unity*, pp. 287-8.

<sup>2</sup> *Proceedings of the Imperial Conference, 1911*, Cmd. 5745, p. 438.

was the provision in the so-called 'Bryan Treaty,' made by Great Britain with the United States in 1914, that in any dispute which concerned a Dominion, representatives of that Dominion should sit as members of the Conciliation Commission which it was the purpose of the treaty to set up. These clauses were important, not only for the substantive changes which they made in British diplomatic practice, but also and still more for the recognition of an incipient Dominion status which they involved. The Dominions had definitely begun to secure rights in the political sphere of international affairs. \*

But in spite of these scattered successes, the claim really involved in Mr. Fisher's motion at the Imperial Conference of 1911—the claim for full consultation with the Dominions on all important questions of foreign policy—was not admitted by the British Government before the War. Indeed, it was emphatically refused. In spite of Grey's concessions, most British statesmen were still inspired by the ideas which had prompted a leading Liberal, Lord Morley, to write not very many years before 1914 that it was 'unthinkable that Australia should ever interest herself in Belgian neutrality.'<sup>1</sup> Mr. Asquith, the Prime Minister of Great Britain, had given full expression to the reservations of the British Government when, in summing up the foreign-policy debate, he declared to the Imperial Conference of 1911 that 'the authority of the Government of the United Kingdom in such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration and maintenance of peace, or the declaration of war, cannot be shared.'<sup>2</sup>

Thus equality of status, in political practice, was still far from complete. It was no less so in legal theory.

<sup>1</sup> Cited by Zimmern, *Third British Empire*, p. 11. Cf. also speech by

p. 33.

Mr. Bruce, cited by Toynbee, *op. cit.*, <sup>2</sup> *Proceedings of the Imperial Conference*, 1911, Cmd. 5745, pp. 71-2.

There was no writer who would accord to the Dominions any position or rights of any kind in International Law. In 1912 Oppenheim, then the leading British authority on the subject, had roundly declared that they 'have no international position whatever.'<sup>1</sup>

Such was the position of the Dominions when the Great War broke out. At this point the development of liberty and equal status had stopped short. But the War, which revolutionised the political and social life of so many states and peoples, was destined to revolutionise the Inter-Imperial relations 'of the 'British Commonwealth' as well.

No one would have guessed during the first two years of the struggle that this would be its ultimate result. The Dominions, it is true, made a formal protest in August 1914 against the action of the British Government in declaring war, and throwing the whole Empire into a life-and-death struggle, without consulting them at all at any stage of the negotiations before the War began. In view of the immense sacrifices which the War imposed upon their peoples, the Dominion Governments' protest was more than justified; yet no one paid serious attention to it at the time. Not only so, but in the succeeding year the Imperial Conference, which was due to hold its regular quadrennial meeting, was unceremoniously postponed. In view of the great contributions which of their own unfettered will the Dominions had already made to the conduct of the War, and in view also of the vast interests which they had at stake, this postponement was surprising, to say the least; indeed, the Conference could hardly have been considered as a very serious mechanism of collaboration if at such a crisis it could be so swept aside.

But as the War went on, as the Dominions played

<sup>1</sup> *International Law*, 2nd ed., 1912, vol. i. § 65.

each year a greater and greater part; as the sacrifices imposed on them were more and more severe, so they began to demand with more insistence a share first in the control of the operations of the War, and then in the determination of the terms of peace. They had realised at last the full burden of their nationhood, and they were disposed to claim its rights. General Smuts became a member of the Imperial War Cabinet, but that was not enough. In 1917 it became evident that an Imperial meeting was urgently required, and accordingly the Imperial War Conference of that year was held. That Conference was of great practical importance in the better ordering of the conduct of the War. But it was of still greater constitutional importance, because it brought results which might otherwise have taken decades of difficult negotiation to obtain. The Conference proceeded at once to discuss the general problem of Dominion partnership in the control of foreign policy, starting from the assumption, categorically denied in 1911, that they had an obvious right to share in that control. They decided, in a famous Resolution, that 'the readjustment of the constitutional relations of the component parts of the Empire' was 'too intricate a subject to be dealt with during the war'; but they laid down at once the basic principles upon which that 'readjustment' must later on be made. They agreed that while it must preserve 'all existing powers of self-government and complete control of domestic affairs' (while, in other words, there must be no Imperial federation, for which some British statesmen had begun once more to clamour), 'it should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth . . . should recognise the right of the Dominions . . . to an adequate voice in foreign policy and in foreign relations, and should provide effective

arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.'<sup>1</sup>

There is no need to stress the vast importance of this Resolution. But it should be noted that it spoke only of 'an adequate voice' in foreign policy, and not of 'an equal voice.' Before the War was over the Dominion leaders had gone further still; they had demanded not only an adequate voice, but full equality with Great Britain in every right of self-government, including full equality in the control of foreign affairs. Sir Robert Borden, the Canadian Prime Minister, and General Smuts were the leaders in expressing these demands; by their persuasive eloquence British statesmen of every school of thought were brought to accept in its fullest implications the doctrine of equal status which they preached.

They accepted it, moreover, not merely as an academic theory, but as a guiding rule for the practical diplomacy of the British Empire. It was soon to have a striking application. All through the War the Dominion leaders had shown their interest in the terms of the peace treaty by which hostilities would end. When the prospect of an armistice at last came in sight, they began to agitate about the method by which they should make their voice heard at the Peace Conference. The Supreme War Council, on which the Dominions had had no separate delegations, provisionally decided that each Great Power should have five delegates; and the British Government proposed that the Dominions and India should have among them one of the five British places, to be taken by different Dominions or by India, according to the subject to be discussed. This suggestion did not meet with the approval of the

<sup>1</sup> *Proceedings of the Imperial War Conference, 1917, p. 61.*

Canadian Cabinet, and on Sir Robert Borden's motion they presented a memorandum to the British Government in which they urged that 'in view of the War efforts of the Dominions, the other nations entitled to representation at the Conference should recognise the unique character of the British Commonwealth, as composed of a group of free nations under one sovereign, and that provision should be made for the special representation of these nations at the Conference, even though it may be necessary that in any final decision reached they should speak with one voice.'<sup>1</sup> This claim was urged with such insistence; not only by Sir Robert Borden but by General Smuts and their other Dominion colleagues, that not only British opposition but the opposition of the foreign Powers in the Supreme War Council was overborne. As Sir Robert explained to the Canadian Parliament, 'strong objection was made to the proposed representation of the British Dominions'<sup>2</sup> by Powers who had hitherto regarded them as no more than subordinate portions of the Empire; but the Dominions' case was so intrinsically strong, their share in the losses and sacrifices of the War so much greater than that of other nations whose footing at the Conference was not disputed, that their arguments ultimately prevailed, and it was decided that they should have the same rights and status as were given to Belgium. Canada, Australia, and South Africa were to have two delegates each; New Zealand, being smaller, only one; Newfoundland, with a population of only a quarter of a million, was recognised to be too small to receive such treatment. Moreover, besides their separate delegations, the Dominion statesmen on occasion sent one of their number to sit among

<sup>1</sup> The documents concerning this controversy about the representation of the Dominions can be found in the Canadian Parliamentary Sessional

Paper, 1919, No. 41 (j).

<sup>2</sup> *Canadian Hansard*, vol. liv. p. 21.

the five British delegates at meetings at which only representatives of the Great Powers were present; on Conference Commissions, where each Great Power had two representatives, one of the two was sometimes a Dominion spokesman,<sup>1</sup> and thus the Dominions had actually in practice a greater voice in the Conference proceedings than Belgium or any other of the smaller Powers.<sup>2</sup>

The admission of their separate delegations to the Peace Conference was the decisive step in the development of the international status of the Dominions. From that admission there followed by a natural and almost an inevitable process the other events that have extended and solidified the international position they then first acquired. Of these events only the briefest summary need be made in the present chapter, for they will need a more elaborate discussion later on.

The most important of these subsequent events was without question the admission of the Dominions to separate Membership of the League of Nations. That, again, was secured at the Peace Conference as the result of the insistence of the Dominion statesmen, led once more by Sir Robert Borden and General Smuts.<sup>3</sup> It was a general recognition of the fact that both in the War and at the Conference itself the Dominions had made good their claim to be given the rights and status of nations. It was the consolidation of the progress towards international status which they had previously made, and the foundation on which all their subsequent progress has been built. It would be difficult, there-

<sup>1</sup> Thus in the Conference Commission which drew up the Covenant of the League of Nations the two British Empire delegates were Lord Robert Cecil and General Smuts.

<sup>2</sup> For an admirable account of the part played by the Dominions at the Peace Conference, see H. Duncan

Hall, *The British Commonwealth of Nations*, chap. vii.

<sup>3</sup> Membership of the League was not gained without 'constant effort and firm insistence on the part of the Dominions.' Sir R. Borden: *vide* Duncan Hall, *loc. cit.*, p. 338.

fore, to overstate its importance in the constitutional development of the Imperial system of the British Empire.

But besides their entry as separate Members into the League of Nations, other events of great importance have happened since the Peace Conference that have helped to consolidate and extend the victory they won there. Broadly speaking, these events have meant the extension into the political sphere of foreign policy of the privileges which they had acquired in the commercial and technical spheres before the War. Thus the Dominion statesmen signed the treaties of peace as separate delegations, and on behalf of the Governments for which they respectively spoke, just as their predecessors had signed technical conventions seven years before. The significance of these separate signatures lies, of course, in the fact that the treaties of peace are by far the most important political instruments of modern times. Thus, again, in the Treaty of Guarantee signed in 1919 by Great Britain and France, which was never ratified by Great Britain because the United States failed to ratify their parallel treaty with France, the Dominions were not included; under this treaty they were liable to no obligations of any kind unless their Parliaments voluntarily decided to 'contract in,' as previously they contracted in to commercial treaties. The same principle was adopted in the Locarno Pacts six years later (although in this case it was the Dominion *Governments* and not their Parliaments who were given power in the treaties to decide); and no doubt this principle will be followed in all obligations of international guarantee which the British Government may in future undertake.

Again, after the War they began to make separate treaties of their own, negotiated by themselves, on subjects other than commercial or technical questions.

Thus in 1920 Canada made a separate agreement with Japan on the highly political and highly controversial subject of Japanese immigration.<sup>1</sup> They even extended their rights in respect of such separate treaties beyond those which they had acquired for commercial treaties before the War. In 1923 Canada made a treaty with the United States, the so-called Halibut Fisheries Treaty, which was signed by her own delegate, M. Lapointe, the Canadian Minister of Marine, and by him alone.<sup>2</sup> Again, they have extended their right of sending separate delegations to international conferences—which previously was confined to conferences on technical subjects—to conferences of every kind, and not only to those held under the auspices of the League of Nations, but to ordinary diplomatic conferences as well. The most striking example of the admission of this new right, which has been not wholly uncontested by foreign Powers since the War,<sup>3</sup> is furnished by the Coolidge Naval Conference of 1927, a conference pre-eminently political in character, and not summoned by the League.

But the Dominions have not only secured in a wider sphere the application of pre-war precedents. They have gone altogether beyond the pre-war precedents, and have done so in every department of international affairs.

They have acquired, for example, a right of joint consultation with the Mother Country on every important issue of foreign policy that can arise. This was a logical result of the Imperial War Conference Resolution of 1917, but it has been accepted and developed

<sup>1</sup> Lewis, *B.Y.I.L.*, 1925, p. 43.

<sup>2</sup> In deference to Canadian wishes, the British Government waived their original instructions to their Ambassador to sign also. A controversy has since arisen as to whether the omission of the signature of the British Ambassador from this treaty

was or was not of any constitutional importance. Cf. Lewis, *B.Y.I.L.*, 1925, pp. 33 *et seqq.*; Keith, *J.C.L.*, November 1923, p. 167; Sir R. Borden, *J.R.I.F.A.*, July 1927, pp. 203-4. *Vide also infra*, pp. 164-5 and 174-5.

<sup>3</sup> Cf. pp. 156-63, *infra*.

in the most elaborate way. One formal recognition of the right is found in the Report of the Imperial Conference of 1921 :

‘ It was unanimously felt that the policy of the British Empire could not be adequately representative of democratic opinion throughout its peoples unless representatives of the Dominions and of India were frequently associated with those of the United Kingdom in considering and determining the course to be pursued.’<sup>1</sup>

Still more startling, at least to the outside world, the Dominions have secured the right to send their own accredited diplomatic representatives to foreign Powers. No wide use has yet been made of this new right, but since 1923 an Irish Minister, and since 1927 a Canadian Minister, have been accredited to the United States, while in 1928 a new Canadian legation was set up in Paris and a prospective Irish legation in Paris and a Canadian one in Tokyo were announced.<sup>2</sup>

In other ways the Dominions have made their presence felt as separate factors in the international Society of States. On occasion they have shown a disposition to pursue a political policy of their own, and sometimes a policy in contrast, if not in actual conflict, with that of Great Britain. Thus, in application, as they alleged, of Article 18 of the Covenant, the Government of the Irish Free State in 1925 registered with the League of Nations the Anglo-Irish ‘ treaty ’ in virtue of which the Free State was set up, although the British Government formally protested that that treaty was not an ‘ international engagement ’ of any kind.<sup>3</sup> Thus, again, the Canadian Government in March 1925 addressed to the Council of the League a separate note stating their policy on the Geneva Protocol—a policy which differed greatly from that which Sir Austen

<sup>1</sup> Parliamentary Papers, Cmd. 1474, p. 3.

<sup>2</sup> Cf. pp. 147-56, *infra*.

<sup>3</sup> Cf. pp. 305-6, 319 *et seqq.*, *infra*.

Chamberlain, the British Foreign Secretary, expounded to the Council for the British Government.<sup>1</sup> In 1928, in the negotiations for the Kellogg Treaty for the Renunciation of War, each of the Dominions made its own separate and quite different answers to the notes which it received from the United States; and it was particularly noticeable that only India expressed agreement with the somewhat controversial note sent by the British Government on May 19, 1928.<sup>2</sup> Last, and perhaps most important, the Dominions have insisted that their voice be heard in questions of peace and war. In 1922 there happened the famous episode of Chanak, when the Lloyd George Government, as their last executive action, invited the Dominions to assist them in opposing by force of arms the advance of the Turkish troops from Asia Minor across the Sea of Marmora to the shores of Europe. The Dominions had all acquiesced with astonishing loyalty in the British declaration of war in 1914, but some of them showed great reluctance to participate again in war, and their attitude implied a protest against the method by which the proposal had been made. Thus Canada virtually refused to give any military assistance of any kind; Australia agreed to help if it should be absolutely required, but her delegate at the Assembly of the League, which happened to be in session, simultaneously supported in the strongest language a Norwegian proposal that the League should intervene and seek to end the war.<sup>3</sup> This Dominion action was successful, for the British Government immediately modified the

<sup>1</sup> Note dated March 10, 1925, published in *Official Journal of the League of Nations*, September 1925, 6th year, No. 9.

<sup>2</sup> Vide *Times*, June 13, 1928.

<sup>3</sup> Vide speech by Sir J. Cook, *Records of the Third Assembly, Committee VI.*, September 22, 1922. Cf. *infra*, pp. 100-2. As

Toynbee points out (*op. cit.*, p. 51), on this occasion the Dominions and Great Britain were divided in the Assembly on a vital matter of foreign policy. For an illuminating discussion of the whole incident, and of its political consequences, vide *ibid.*, pp. 46-52.

military plans it had prepared, and largely as a result the Cabinet in power was driven to resignation.<sup>1</sup>

There are some writers who hold that these events have rendered untenable the theory that there can in future be any 'unitary foreign policy of the British Empire.'<sup>2</sup> Whether this be true or not, it must be held, the present writer believes, that these new Dominion rights amount, both in practice and in theory, to an international status of an important kind. This status has been 'codified,' if the expression may be allowed, in two documents, the Covenant of the League of Nations and the Report of the Committee on Inter-Imperial Relations of the Imperial Conference of 1926. It is the purpose of the succeeding chapters to discuss the effect of these documents. As will appear, it is still disputed in what sense and in what measure the Dominions have become 'persons' of International Law. But, even if legal definitions may be still disputed, it cannot any longer be disputed that in practice they are nations with a separate position of their own in the international politics of the Society of States; that, as nations, they have effective control not only over their domestic policy, but over their foreign policy as well; that they have created for themselves a separate place in respect of what has been called 'la haute politique';

<sup>1</sup> On Dominion participation in war, cf. pp. 330 *et seq.*, *infra*.

<sup>2</sup> Cf. Lowell and Hall, *British Commonwealth of Nations*, 1927, pp. 605 *et seq.* Cf. also the following very important declaration by General Hertzog at Pretoria on December 20, 1926, cited *ibid.*, p. 686: 'It must now be clear to every one of you how completely, by the declaration of the Imperial Conference in regard to our status, the Empire group unit idea has been broken with—that idea so assiduously pleaded and preached by some people since 1919. That idea by which the Empire would in reality have acted as an

authoritative unit to which the individual state members would have given up their individual free national will in reference to foreign interests, has been deliberately rejected by the Imperial Conference as being unsuitable and unwanted for our national liberty. This is a fact of the very greatest importance. Under the régime of the group unit idea there could be no question of Dominion national liberty; and under that only the Empire as a unit would, in theory, be regarded as sovereign free and Great Britain as a nation would, in practice, be regarded as really free.'

that they are free to make their own treaties, commercial, technical, or political, to take their own separate part in international conferences, to create their own separate diplomatic services, to determine their own entry into or abstention from the active operations of any war. They have, in short, achieved the full application, in every branch of legislative and administrative action, of the self-government which was first accorded to them with large but unstable limitations three-quarters of a century or more ago.

They have achieved this completed liberty in their international as in their national affairs because their leaders have striven for it with a conscious and unshaken purpose from the first. They have striven to be nations not only with a place in the structure of the Empire, but with a place in the structure of the Society of States. When Sir John Macdonald sought and obtained the right to appoint a Canadian High Commissioner in London in 1879, he not only did so because he believed in 'the absolute necessity of direct negotiation with foreign Powers for the proper protection of Canadian interests,' but also because he believed that Canada's rank and power should entitle her to have 'a resident minister at the Court of St. James,' who should also be 'duly accredited to foreign Courts,' who should have 'a diplomatic position at the Court of St. James, and a recognised position among the *corps diplomatique*.' He wanted all this because, as he said, it would have been a symbol of the fact that Canada was being treated not as 'a dependency' but as 'an auxiliary Power.'<sup>1</sup> What Sir John Macdonald desired that she should be, Canada has now become. She is recognised by Great Britain and the world 'as an auxiliary Power' with a position of her own. Her growth to 'equal

<sup>1</sup> Sir J. Macdonald's Memorandum to the Colonial Office; vide *Life of Sir Charles Tupper*, ed. by Saunders, vol. i. pp. 275-7.

status,' and the growth of the other Dominions with her, has been extremely rapid, as constitutional evolutions mostly go; but it would have been more rapid still had there been no obscurantist opposition of certain schools of thought in Great Britain itself. 'To give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government,' wrote a Whig Colonial Secretary, Lord Ripon, in 1895, when some one had expressed the desire to negotiate a commercial treaty alone, as Canada actually did only twelve years later, 'would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states.'<sup>1</sup> The Dominion statesmen had to prove, step by step, by their courage, their perseverance, and their wisdom, that in truth there could be 'no limits to freedom,' and that the only true union among civilised and democratic peoples lay in the unrestricted liberty both of their institutions and of their relations with each other and with the world. That they were able to prove this, and that in the process they were able not to lose, but on the contrary to increase, the goodwill of the British people, was due at every stage to the enlightened nationalism by which they were consistently inspired.

<sup>1</sup> Despatch of June 28, 1895, to all self-governing Colonies. Cited by Porritt, *op. cit.*, p. 195.

## CHAPTER IV

### THE INTERNATIONAL JURIDICAL STATUS OF THE DOMINIONS IN THEIR CAPACITY OF MEMBERS OF THE LEAGUE OF NATIONS

THE last two chapters have given a summarised description, analytical and historical, of the political 'nationality' of the Dominions. Events have shown that hardly any of the writers who have hitherto discussed the constitutional and legal status of the Dominions has given sufficient weight to this factor of their nationhood. For that reason the writers have nearly always been behind the times: Dominion status has developed beyond their most confident predictions, and has done so with a rapidity which none of them foresaw; theories put forward quite recently with high authority behind them are already plainly out of date. For this reason the present writer has sought to give particular attention in this study, both in the preceding pages and in those that follow, to the facts; he has sought to describe and analyse the present international position of the Dominions as it actually is, and to take account, so far as he is able, of all their international action right up to the moment at which this book has gone to press. For, he believes, it is only by the examination, not of textbook doctrines, but of their own effective international action that the real legal status of the Dominions can be explained and understood.

In such discussion as there has been of the international legal status of the Dominions, some writers

have divided the subject into two separate parts, namely, the status of the Dominions as Members of the League of Nations and their status outside the League. These writers, that is to say, have, for purposes of exposition and discussion, made a division between the international rights and obligations of the Dominions under the Covenant of the League, and the other international rights and obligations, if any, which they possess. Oppenheim was the first to make this division; Pearce Higgins, Keith, Lewis, and others have since adopted it.<sup>1</sup>

The division in some respects is artificial, even for the purposes of exposition; but although it has this disadvantage, it has advantages as well. For the sake of these advantages, and because the arrangement of the subject matter which it dictates happens to be well adapted to the course of the historical development of Dominion status in recent years, it will be followed here. Thus the international rights and obligations of the Dominions under the Covenant will be discussed separately from their other international rights and obligations. It will be convenient to discuss their status in the League of Nations first, because, as was said in the preceding chapter, their admission to the League as separate Members was the decisive step in the consolidation and development of their international position in the Society of States.

There are, however, two preliminary points which require discussion before the question of Dominion status in the League is taken up.

The first concerns the legal nature of the Covenant. What is the Covenant, from the legal point of view?

<sup>1</sup> Oppenheim, 3rd ed. (1920), i. §§ 94a, 94b, Pearce Higgins; Hall's *International Law*, 8th ed. (1925), p. 35; Keith, *Constitution, Administration, and Laws of the Empire*,

chap. iii.; *Journal of Comparative Legislation*, 1923, p. 160; Lewis, 'Treaty-making Power of the Dominions,' *B.P.I.L.*, 1925. .

Are the rules which it lays down rules which have binding force by International Law? Or are they simply agreements among the Members of the League, which are no more than morally binding upon them?

The answer is not open to reasonable doubt. The Covenant is conventional International Law, and must be so regarded by every Member of the Society of States, whether it be itself a Member of the League or not. For it is an international convention, accepted and applied by the Governments of no less than fifty-five different nations, of which forty-nine are universally admitted to be independent sovereign states. Without a shadow of doubt, therefore, the Covenant, even to non-Member states, is what is called conventional International Law; it is Law the existence of which all states are obliged to recognise and to respect, although while they remain outside the League they are not themselves bound by the prescriptions it lays down.<sup>1</sup> It is, moreover, even to non-Member states, conventional International Law of a particularly important kind, both because of the nature of the international relationships with which it deals, and because it has been accepted and put into force by almost all the civilised nations of the world. Indeed, what other law-making convention has been accepted and applied by so great a number of the Governments which make up the International Society of States? Only by denying the validity of the whole conception of conventional International Law can the legal nature of the Covenant be impugned.

It is, then, even to non-Member nations, a legal instrument of a particularly important kind. But to nations which are Members it is even more. It was

<sup>1</sup> Cf. Oppenheim, *International Law*, vol. i. p. 23, § 18, 2nd ed. (1912): 'There have been many law-making Treaties concluded which

contain General International Law, because the majority of states, including leading Powers, are parties to them.'

Oppenheim, again, who first laid down a proposition that is now generally accepted. 'The League of Nations,' he wrote, 'is intended to take the place of what used to be called the Family of Nations. The Covenant of the League is an attempt to organise the hitherto unorganised community of states by a written constitution.' And again: 'In its essence the League is nothing else than the organised Family of Nations.'<sup>1</sup> That is to say, the Covenant is a kind of constitutional International Law; the rights which it confers and the obligations which it imposes on its Members are the dynamic rights and obligations of a living society, which must inevitably grow, change, and develop with the growth, change, and development of the society itself; they are rights and obligations which correspond to and express what have been well called<sup>2</sup> 'the new organic relations' of the states of which the Society is composed. Each year that has passed since 1920 has shown more and more clearly that Oppenheim was right. And if he was right, it follows that to the Members of the League the rights and obligations of the Covenant are not only part, but they are the most important part, of the general system of International Law. They are the most important part, because, for the Members of the League at least, they give to the whole system a new force and life, by giving to it a permanent political organism which can apply it, modify it, and renew it to meet the changing needs which time must bring.

The second preliminary point to be discussed concerns the method by which the Dominions became Members of the League. They were declared to be original Members by the annexe attached to the Cove-

<sup>1</sup> Oppenheim, 3rd ed. (1920), i. § 167c.

<sup>2</sup> By E. J. Phelan, 'The Sove-

reignty of the Irish Free State,' *The Review of Nations*, Geneva, March 1927, pp. 43-4.

nant, which itself was the first part of the Treaty of Versailles. But by what action was it that their adherence to the League became effective? Was it by their own separate signature of the Treaty of Versailles, by their own separate decisions to ratify? Or was it, as some writers have learnedly maintained, by the signature and ratification of the British Government, acting in the name and on behalf of the British Empire as a whole?

The point deserves consideration, first, because of its great doctrinal interest; second, because the signature and ratification of the Treaty of Versailles is a most important precedent in international Dominion action; third, because it has a bearing on the nature of the obligations which the Dominions undertook towards the other (non-British) Members of the League.

It will be argued here that it was by virtue of their separate signatures and of the separate decisions of their Parliaments and Governments to ratify the Treaty of Versailles—in virtue of the fact, that is to say, that they were separate individual and original parties to that treaty—that the Dominions assumed the rights and duties of Members of the League.

The contrary doctrine has been expounded by Keith, by Rolin, and by others. Their arguments are these:

First, they maintain that in the Peace Conference the Dominions, ‘although allowed the right of expressing their views separately in respect of their special interests, were still primarily represented by the British delegation.’<sup>1</sup>

Second, they argue that the treaties, although signed by representatives of the Dominions, were really ‘signed for the British Empire as a whole, though by

<sup>1</sup> Keith, *Constitution, Laws, and Journal of Comparative Legislation, Administration of the Empire*, p. 44; 1923, pp. 163-4.

representatives of different portions, not separately for each part of the Empire.'<sup>1</sup> In support of this, they urge that the Dominion delegates 'were all appointed on the formal recommendation of the Imperial Government to the Crown.' Thus, they say, the 'international competence' of the Dominion delegates was derived not from action of their Dominion Governments, 'but from the formal full powers issued to them under the royal sign-manual and the counter-signature of the Secretary of State for Foreign Affairs.'<sup>2</sup>

Next, they say 'that the British Empire alone was named in the treaty as one of the Principal Allied and Associated Powers, no mention being made of the Dominions or India separately among the minor Powers.'<sup>3</sup>

Next, they urge that the signatures of the Dominion delegates are so grouped together at the end of the treaty as to make it plain that the Dominions have no separate status but are simply constituent parts of a larger contracting whole.<sup>4</sup>

From these facts they deduce the conclusion that 'the separate signatures of the Dominions and India were internationally unimportant,' since the Dominions would have been bound by the treaty whether their delegates had signed it or not.<sup>5</sup>

There are two portions of the preamble of the Treaty of Versailles which are relevant to the doctrine just explained. The first consists of the opening words of the Treaty, which are as follows :

'The United States of America, the British Empire, France, Italy, and Japan,

<sup>1</sup> *Ibid.* Cf. also Rolin, *Revue de Droit International et de Législation Comparée*, 3rd Series, vol. ii. pp. 197 et seqq.

<sup>2</sup> *Ibid.*

<sup>3</sup> Keith, *Journal of Comparative*

*Legislation*, November 1923, pp. 163-164.

<sup>4</sup> E.g. Smith and Corbett, *Canada and World Politics*, pp. 112-13 and 120.

<sup>5</sup> Keith, *Journal of Comparative Legislation*, November 1923, p. 164.

‘These Powers being described in the present treaty as the Principal Allied and Associated Powers,

. ‘Belgium, Bolivia, Brazil, etc. . . .

‘These Powers constituting with the Principal Powers mentioned above the Allied and Associated Powers,’ . . .

In this opening enumeration of the Allied and Associated Powers there is no separate mention of the Dominions.

The second portion of the preamble which is relevant is as follows :

‘For this purpose the High Contracting Parties represented as follows : . . . His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India, by

‘The Right Honourable David Lloyd George, M.P., First Lord of his Treasury and Prime Minister, etc. (here follow the names of the other British delegates),

and

‘For the Dominion of Canada, by

‘The Honourable Charles Joseph Doherty, Minister of Justice, etc.

‘For the Commonwealth of Australia, by

‘The Right Honourable William Morris Hughes, Attorney-General and Prime Minister, etc.’

The other formal point about the Treaty of Versailles which is important to the present doctrine concerns the signatures of the British and Dominion delegates at the end. In fact, the only difference that is made between the signatures of the Dominion delegates and those of the delegates of other Powers is that the Dominions do not appear in their proper alphabetical order among the other signatory nations, but that, ‘on the contrary, they are grouped together

after the British Empire. The list of signatures thus reads :

‘D. LLOYD GEORGE.  
A. BONAR LAW.  
MILNER.  
ARTHUR JAMES BALFOUR.  
GEORGE N. BARNES.  
CHARLES J. DOHERTY.  
ARTHUR L. SIFTON.  
W. M. HUGHES, etc. etc.’

There is no other difference of any kind between the signatures of the Dominion delegates and those of the delegates of other nations.

The doctrine explained above is at first sight attractive, but it seems difficult to reconcile it with an impartial examination of all the facts. If it were accepted it would mean that the Dominions were not separate parties to the Treaty of Versailles. But when the full facts concerning their signature and the ratification of the treaty are examined, it is difficult to doubt that they were in law separate parties, as they both desired and intended that they should be.

It must at once be admitted, however, that the form of the treaty, as shown in the paragraphs cited above, does at first sight leave some points in doubt. For these paragraphs were in fact a compromise between two conflicting doctrines. The British delegation desired that the whole Empire should sign the treaty as a single diplomatic unit, and therefore as a single signatory party ; the Dominion delegations desired, on the contrary, that they should sign separately and be separate parties. With this in view, the Dominion Prime Ministers prepared a scheme of their own for the form which in their view the treaty ought to take. This scheme was set out in a memorandum prepared by

Sir Robert Borden on behalf of his Dominion colleagues and circulated to the British delegation on March 12, 1919. In this memorandum, the declared purpose of which was 'to enable the Dominions to become Parties and Signatories' to the Treaty, the following passage occurs :

' 5. It is conceived that this proposal (for the Dominions to be separate parties) can be carried out with but slight alteration of previous treaty form. Thus :

' (a) The usual recital of heads of states in the preamble needs no alteration whatever, since the Dominions are adequately included in the present formal description of the King, namely, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas.

' (b) The recital in the preamble of the names of the plenipotentiaries appointed by the High Contracting Parties for the purpose of concluding the treaty would include the names of the Dominion plenipotentiaries immediately after the names of the plenipotentiaries appointed by the United Kingdom. Under the general heading "The British Empire," the sub-headings "The United Kingdom," "The Dominion of Canada," "The Commonwealth of Australia," "The Union of South Africa," etc., would be used as headings to distinguish the various plenipotentiaries.

' (c) It would then follow that the Dominion plenipotentiaries would sign according to the same scheme.' <sup>1</sup>

Had this proposal by Sir Robert Borden been adopted for the form of the treaty, the signature by the delegates of Great Britain on behalf of the British Empire as a whole would, as he desired, have been avoided. But his proposal was not adopted ; on the contrary, his sub-heading 'United Kingdom' was omitted from the treaty as drawn up. And the effect of its omission

<sup>1</sup> For the whole text of the memorandum *vide* Canadian Parliamentary Papers, Sessional Paper 41J., A. 1919, pp. 6-7.

was that the delegates of Great Britain signed for the Empire as a whole, while the delegates of the Dominions signed each for the Government which he represented. On this procedure Sir Robert Borden has made the following comments :

'The form of signature was not precisely that which I had proposed on behalf of the Prime Ministers of the Dominions. It differed in this respect: British plenipotentiaries signed not only for the United Kingdom and its dependencies other than the Dominions, but for the entire Empire—for all the Dominions; and the Dominion plenipotentiaries signed also for their respective Dominions. In that way the Dominions had the doubtful advantage of a double signature. That,' adds Sir Robert Borden, 'is one of the anomalies corrected by the Report of Lord Balfour's Committee.'<sup>1</sup> <sup>2</sup>

Sir Robert Borden held that this method of double signature for the Dominions was cumbrous in theory and unnecessary in practice. In the next chapter it will appear that in 1926 his view was destined to prevail. In 1919, however, he did not get his way, and the Dominions, therefore, were formally bound by a double signature to the obligations of the Treaty of Versailles. But can it be deduced from that fact that their separate signatures were of no value or avail; that Canada, for example, was not a contracting party; that the only

<sup>1</sup> Vide *Journal of the Royal Institute of International Affairs*, July 1927, p. 201.

<sup>2</sup> Cf. the following extract from the Report of the Committee on Inter-Imperial Relations of the Imperial Conference of 1926: 'In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire," with an enumeration of

the Dominions and India, if parties to the Convention, but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire." *This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.*' Cmd. 2768 (1926), p. 22. (My italics.) Cf. also pp. 168 *et seqq.*, *infra*.

contracting party was the British Empire as a whole ; and that the Canadian delegates were permitted to sign as a kind of empty courtesy ?

In answering this question, the following points require consideration :

First, the Canadian delegates held full powers granted by the Crown, and formally prepared by the British Foreign Office. These powers were drawn up, however, as the result of a special Canadian Order in Council, drafted by Sir Robert Borden ; an Order in Council which advised the King to issue letters-patent to the Canadian Ministers named therein appointing them plenipotentiaries in respect of the Dominion of Canada, with full power and authority to conclude ' treaties, conventions, or agreements in connection with the said Peace Conference, and to sign for and in the name of His Majesty the King, in respect of the Dominion of Canada, everything so agreed upon and concluded. . . .'<sup>1</sup> The substance of this Order in Council was communicated at once to Downing Street, with the following message from Sir Robert Borden to the British Prime Minister, Mr. Lloyd George :

' A certified copy of the Order in Council will be sent from Ottawa to His Majesty's Government at London. When it reaches the Foreign Office some appropriate step should be taken to link it up with the full powers issued by the King to the Canadian plenipotentiaries and with the papers connected therewith, *in order that it may formally appear in the records that these full powers were issued on the responsibility of the Canadian Government.*'<sup>2</sup>

It was only in form, therefore, that these papers were granted on the advice of British ministers ; in constitutional law, as will be argued later, they were

<sup>1</sup> Canadian Sessional Paper, 1919, 41J., pp. 9-10. (My italics.)

<sup>2</sup> These documents are published in the Canadian Sessional Paper, 1919, 41J. (The italics are mine.)

granted on the sole advice of the Canadian Government.<sup>1</sup>

Second, in pursuance of the doctrine which inspired the drafting of his Order in Council, Sir Robert Borden circulated to the British Delegations at the Peace Conference the striking memorandum of March 12, 1919, which was mentioned above, and in which, on behalf of all the Dominion Prime Ministers, he demanded that:

‘All the treaties and conventions resulting from the Peace Conference should be so drafted *as to enable the Dominions to become parties and signatories thereto.*<sup>2</sup> This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole, and will, at the same time, record the status attained there by the Dominions.’<sup>3</sup>

Sir Robert Borden supported this claim by arguing that it followed logically from the principle of ‘equality of nationhood’ adopted in the Imperial Conference Resolution of 1917 that in the making of the treaty the Dominions should stand on the same footing as Great Britain or any other nation. His claim was formally accepted by the Peace Conference, and, because it was accepted, the Peace Treaty was drawn up in a form which allowed separate plenipotentiaries to be named and to sign for each of the Dominions.

Third, as is shown above, the preamble has two parts that are relevant to the present point. The first, the opening list of the contracting parties, mentions, it is true, only the ‘British Empire’; but the second shows that ‘His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas,’ has empowered six different and separate groups of plenipotentiaries to sign the treaty

<sup>1</sup> Cf. pp. 193 *et seq.*, *infra*.

<sup>2</sup> My italics.

<sup>3</sup> Canadian Sessional Paper, 1919, 41J., p. 6.

on his behalf. It is plainly possible to give to this formula the sense that the King was a contracting party six times over: once for the Empire as a whole, and once for each of the Dominions. That is precisely the interpretation which Sir Robert Borden does give to it, and it is an interpretation that is a logical and even a necessary application of the general constitutional doctrine on which all his policy was based: the doctrine that 'the Crown is the supreme executive in the United Kingdom and in all the Dominions, but it acts on the advice of different ministries within different constitutional units.'<sup>1</sup>

This view, moreover, is supported by the very high authority of Sir Cecil Hurst. Discussing the Treaty of Versailles and the way in which it was drawn up, Sir Cecil uses the following language:

'Something more also was wanted to secure recognition for the position of the Dominions than mere representation in the Council chamber; a treaty indicates upon the face of it the countries between which it is concluded, and the plenipotentiaries through whom they contract. If the Dominions were to be given what they considered to be their just due, *some means must be found of indicating on the face of the treaty their participation in it*, and the only proper way of doing so was through plenipotentiaries for whose appointment they were themselves responsible.

'This was achieved. If you look at the Treaty of Versailles, the treaty by which the Allied Powers made peace with Germany, there *you will see in the preamble the names of all the Dominions and of India figuring among the states by whom the treaty was concluded*, and you will see the names of the plenipotentiaries by whom it was signed on their behalf.'<sup>2</sup>

It would thus appear that in Sir Cecil's view even the

<sup>1</sup> Canadian Sessional Paper, 1919, 41J., p. 6. This doctrine is further discussed in Chaps. V. and VI., *infra*.

<sup>2</sup> *Op. cit.*, pp. 70-1. (My italics.)

terms of the preamble of the Treaty of Versailles support the conclusion that the Dominions are to be regarded as separate contracting units enumerated in the preamble as such, and acting on a footing of equality with the other 'countries between which it was concluded.'

Fourth, the Treaty of Versailles was ratified by His Majesty the King only when it had received the separate approval of the Dominion Parliaments, and when, that approval having been obtained, the Dominion Governments gave their definite consent. The fact is the more important because the British Government expressed their desire to ratify before the Dominion Parliaments had had an opportunity to consider the treaty, and the Colonial Secretary, Lord Milner, urged that Dominion Parliamentary approval was unnecessary, and that the signature of the Dominion delegates might be taken as equivalent to the tendering of advice to ratify. The Dominion Governments, however, led by Canada, rejected his suggestion; they insisted on laying the treaty before their respective Parliaments; and when they had secured Parliamentary approval they drew up Orders in Council of their own advising the Crown to ratify on their behalf. The Canadian Order in Council runs, in part, as follows :

'Whereas at Versailles, etc. . . .

'And Whereas the Senate and House of Commons of the Dominion of Canada have by resolution approved of the said Treaty of Peace ;

'And Whereas *it is expedient that the said Treaty of Peace be ratified by His Majesty for and in respect of the Dominion of Canada ;*

'Now therefore the Governor-General in Council, on the recommendation of the Secretary of State for External Affairs, is pleased to order and doth hereby order that *His Majesty the King be humbly moved to approve, accept,*

*confirm, and ratify the said Treaty of Peace, for and in respect of the Dominion of Canada.'*<sup>1</sup>

The terms of the Order in Council leave no doubt that in the minds of the Canadian Cabinet, at least, the ratification of the treaty was effected by the Crown not only for the Empire as a whole, but also for Canada as a separate contracting party.<sup>2</sup>

Fifth, the change thus introduced into British diplomatic practice in regard to the appointment of plenipotentiaries, the signing of treaties, and the giving of advice for their ratification, was considered by the Dominion leaders to be of capital importance. 'For the first time in history,' said General Smuts, 'the British Dominions signed a great international instrument, not only along with the other Ministers of the King, but with the other Ministers of the Great Powers of the world.' That, he said, constituted 'one of the most important landmarks in the history of the Empire.'<sup>3</sup>

A responsible Prime Minister would not have used such language if signature of the treaty by Dominion delegates had been nothing but a form, allowed by courtesy but signifying nothing real of any kind. It so happens that Sir Robert Borden's view explained above concerning the proper form of the treaty received the confirmation of the Imperial Conference in 1926; in its applications to treaty procedure his doctrine is now therefore the accepted constitutional doctrine to which all the members of the 'British Commonwealth' have agreed.<sup>4</sup> But even without that conclusive confirmation,

<sup>1</sup> My italics. For this document and the correspondence between the Canadian and British Governments concerning ratification, *vide* Canadian Sessional Paper, 1919, 41J., pp. 10-13. Precisely the same procedure was followed in all particulars for the signing and ratification of the

later treaties of peace.

<sup>2</sup> For a further discussion of this point cf. pp. 176-83, *infra*.

<sup>3</sup> Speech in the Union House, September 8, 1919.

<sup>4</sup> In 1926. Cf. *infra*, Chap. V., pp. 168 *et seqq.*

the facts adduced above would appear to prove that the Dominions were, as they desired to be, separate contracting parties to the Treaty of Versailles; that they were recognised to be so by their own Parliaments, by the British Government, and by the Governments of all the other signatory Powers. The Dominion Orders in Council, Sir Robert Borden's memoranda, and the rest, are the essential legal facts of the question at issue, and they all point to a conclusion that cannot be resisted. It may be true that the Dominions were bound, as Sir Robert Borden says, by the signatures of the British delegation; but they were bound again, in their own right and name, by the signatures of their own Dominion delegations.

Sixth, this conclusion cannot be in any way controverted by the argument mentioned above concerning the grouping of the signatures of the British and Dominion delegates in the Treaty of Versailles.<sup>1</sup> It has been stated by Smith and Corbett as a general proposition, applicable both to the Treaty of Versailles and to other treaties that: 'The object of group signature appears to be precisely to avoid making different parts of the Empire separate parties.'<sup>2</sup> This would have been even in 1920 a somewhat extreme deduction from a mere formula of treaty construction, particularly in view of the memoranda by Sir Robert Borden and the other facts of which an account has just been given. But if it were tenable in 1920, it can hardly be held to be so to-day. For the precedent of the Kellogg Treaty for the Renunciation of War must henceforward be conclusive. The signatures of the British and Dominion plenipotentiaries were grouped together on that treaty precisely as they were on the Treaty of Versailles. Yet no one doubted that the Dominions were separate signatory parties to the Kellogg Treaty. In its original

<sup>1</sup> *vide* p. 69, *supra*.

<sup>2</sup> *Canada and World Politics*, p. 120.

note to the Dominion Governments inviting them to sign the treaty the United States Government used the following language :

‘My Government has hoped from the outset of the present negotiations that the Governments of the Dominions and the Government of India would feel *disposed to become parties to the suggested anti-war treaty*. It is, moreover, most gratifying to the Government of the United States to learn that His Majesty’s Governments in the Dominions and the Government of India are so favourably inclined towards the treaty for the renunciation of war which my Government proposed on April 13, 1928, *as to wish to participate therein individually and as original signatories*, and my Government, for its part, is most happy to accede to the suggestion contained in your Note to me of May 19, 1928.

‘Accordingly, I have been instructed to extend, through you, to His Majesty’s Governments in Australia, New Zealand, and South Africa, and to the Government of India, *a cordial invitation, in the name of the Government of the United States, to become original parties to the treaty for the renunciation of war which is now under consideration.*’<sup>1</sup>

In accepting this invitation, the South African Government expressed ‘*their willingness to be a party to the proposed treaty.*’<sup>2</sup>

In view of this language, there can be no question that the grouping of the signatures to the Treaty of Versailles leaves wholly unaffected the conclusion that the Dominions were separate parties to that treaty in their own right and name.<sup>3</sup>

<sup>1</sup> My italics. Note to Secretary of State for Foreign Affairs, for transmission to Australia, New Zealand, and South Africa, dated May 22, 1928. Vide *Times*, May 25, 1928.

<sup>2</sup> My italics. Note from Secretary of State to United States Chargé d’Affaires, June 15, 1928. *Times*, June 26, 1928.

<sup>3</sup> Nothing in the above discussion

applies to the admission of the Irish Free State to Membership of the League. That admission took place in 1923 without the intervention of the British Government at any stage or in any way whatever, by the application of the Irish Government for admission, and by the favourable vote of the Assembly of the League. The application was made on the

It follows from this conclusion—and the point is sufficiently important to justify so lengthy a discussion—that the rights and obligations of the Dominions as Members of the League are rights and obligations which they have assumed, not by the will and action of the Mother Country, but each by its own individual choice and act. Thus in the League the Dominions are, in rights and obligations, the equals of the other Members of the League. They are not, either by the method of their entry or in any other way, the inferiors of the Mother Country, nor of any sovereign state. ‘The Dominions,’ declared General Smuts in July 1919, ‘have been well launched on their great career; their status of complete nationhood has now received international recognition, and as members of the Britannic League they will henceforth go forward on terms of equal brotherhood with the other nations on the great paths of the world.’<sup>1</sup> A year or two later in the Imperial Conference the British Prime Minister, Mr. Lloyd George, used similar language: ‘*The British Dominions have now been accepted fully into the comity of nations by the whole world. . . . They have achieved full national status, and they now stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth.*’<sup>2</sup> On another occasion General Smuts declared: ‘A question has been put whether South Africa has exactly the same advice and the same representation on the League of Nations as Britain. *The answer is in the affirmative, absolutely and independently of Great Britain.*’<sup>3</sup>

sole initiative of the Irish Government. Thus in every particular the Irish Free State stands as regards its Membership of the League on an identical footing with those sovereign states which have been admitted to Membership since 1920 by the will of the Assembly as a whole. For the facts concerning the admission

of Ireland, *vide* Toynbee, *op. cit.*, pp. 53-4.

<sup>1</sup> Cited by Hall, *The British Commonwealth of Nations*, p. 338.

<sup>2</sup> Cmd. 1474 (1921), p. 14. (My italics.)

<sup>3</sup> In the Union House, September 1919; cited by Hall, *ibid.*, p. 339. (My italics.)

'General Smuts' claim has never been contested in theory by any British or foreign authority, and it has been upheld in practice by the consistent attitude and action of the League. Thus the First Assembly rejected a proposal for part admission of nations to the League, on the ground that 'partial Membership' would be contrary to principle, since it would render Members unequal in their rights and duties.<sup>1</sup> Similarly in 1928, in response to a request by the Government of Costa Rica that the Council of the League should define the Monroe Doctrine, the Council made a reply in which the following sentences occur: 'There is another point to which the Council ventures to draw your Government's attention. The Covenant of the League forms a whole; the Articles of which it is composed *confer upon all the Members of the League equal obligations and equal rights.*'<sup>2</sup> Thus again the Fourth Assembly admitted the Irish Free State as a Member in her own right, upon her own application, without any conditions, restrictions, or limitations of any kind. No one has suggested that there is any difference of status in the League between the Irish Free State and any other of the Dominions. Finally, the Dominions have received international Mandates from the League, Mandates conferred upon them in a form which leaves no room for doubt that they are both separate and equal Members.<sup>3</sup> It cannot be disputed, therefore, that the Dominions are equal Members of the League, with the same rights and obligations under the Covenant as the sovereign states that are its other Members.<sup>4</sup>

<sup>1</sup> *Vide* Proceedings of the First Assembly, 1920, Minutes of the Sixth Committee; also Fauchille, *Traité de D.I.P.*, 1922, tome 1<sup>er</sup>, pp. 335-6.

<sup>2</sup> Telegram of the Council, dated September 1, 1928: Monthly Summary of League of Nations, September 15, 1928, p. 225. (My italics.)

<sup>3</sup> The Mandate in each case is 'conferred upon His Britannic Majesty for

and on behalf of' the Government of the particular Dominion. *Vide* Oppenheim, 4th ed., 1928, vol. i. p. 196.

<sup>4</sup> Cf. Lewis, *B.Y.I.L.*, 1922-23, p. 33: 'As far as the League is concerned, they [the Dominions] have the same rights and duties as independent states.' Cf. also *infra*, p. 310, for another important point.

Not only so, but the Dominions have individually assumed these rights and obligations by a general contract with all the other (non-British) Members of the League. Thus each Dominion has a separate individual responsibility towards the other Members for the loyal fulfilment of the obligations it has assumed; <sup>1</sup> it cannot throw that responsibility on to the British Empire as a whole, nor evade its undertakings by urging that it is only one constituent unit of a larger group. The Dominions are nations, and, by their own will, have been recognised as such; since they desire the rights and privileges of nations, they must themselves undertake the complete responsibility of fulfilling the duties which those rights and privileges entail.<sup>2</sup>

The Dominions, then, have been admitted, in their own name and right, as separate and equal Members of what Oppenheim has called 'the organised community of states.' What international rights do they enjoy, by what international obligations are they bound, as the result of their admission?

These rights and obligations are, of course, correlative functions of each other; but once again it will be convenient for purposes of exposition to make an artificial distinction between them, and to begin with a discussion of the rights which the Covenant confers.

#### THE ASSEMBLY.

Each Dominion, like every other member of the League, has the right under § 4 of Article 3 of the

<sup>1</sup> These sentences must not be taken to prejudge the question whether the obligations of the Covenant apply as between the different members of the British Commonwealth *inter se*. That question will be discussed in another connection later on. *Vide infra*, pp. 305 *et seqq.*

<sup>2</sup> That the Dominions themselves take this view of their individual responsibilities has frequently been shown. Cf. especially the attitude of Canada with regard to Article 10 of the Covenant (*vide* pp. 111-13, *infra*), and the South African Note to the United States Government, cited on p. 117, *infra*.

Covenant to send its own separate delegation to the Assembly, and each Dominion delegation, if it desires to be so, is wholly independent of its other British and Dominion colleagues. It is necessary, moreover, to note that this involves a most important change from the system of representation adopted at the Peace Conference in Paris. In the Assembly each Dominion is represented solely and exclusively by its own delegation; there is no joint panel system for the British Empire delegation, by which a delegate from Great Britain can, as at the Peace Conference, on occasion be replaced by a delegate from a Dominion. Nor is this change one of form alone. 'There is a vital distinction,' says Professor Keith, 'between the position of their delegates at League Assembly meetings and at the Peace Conference. At the latter . . . the essential authority rested with the British Empire delegation, on which the Dominions were from time to time formally represented. . . . When a vote was to be taken the only voice was that of the British Empire delegation, on which ultimately the views of the British Government prevailed. . . . In the Assembly the Dominions . . . do not look to the British Empire delegation to express the views of the Empire as a whole.'<sup>1</sup> Of course, too, the Dominions have the right of separate vote, which, as will be shown later, they exercise, as they exercise their general rights in the Assembly, in full independence and without control or restraint of any kind.<sup>2</sup>

<sup>1</sup> Keith, *Constitution, Laws, and Administration of the Empire*, pp. 49-50. Cf. also Toynbee, *op. cit.*, p. 18 n.: 'In practice, the representation of the British Empire in the League was not put into commission between His Majesty's Governments in Great Britain and in the self-governing Dominions and in India, as it had been in the Peace Con-

ference, but was reserved for His Majesty's Government in Great Britain.' It is at least doubtful whether under the Covenant the representation of the Empire could constitutionally be so 'put into Commission,' while it is certain that the Dominions would never agree to such a course.

<sup>2</sup> Cf. *infra*, pp. 92-7.

It is worth noting also that this independence and freedom from restraint has been jealously guarded, even to the extent of public demonstration in the Assembly. At the Sixth Assembly in 1925, the British delegate in the First Committee, in discussing the subject of compulsory arbitration, used the following words :

‘The British Empire at the present moment was a very peculiar and composite political unit. It did not consist of one Government alone ; it consisted of a partnership of six nations standing on a footing of equality. In a matter which affected the vital interests not only of Great Britain but of any one of these six partners, there had to be solidarity of action. In a matter which affected either the vital interests, the independence, or honour of any one of the six nations there must of necessity be unity of action.’<sup>1</sup>

This statement evoked the following reply from the Minister of Justice in the Irish Free State Government :

‘Portions of that speech,’ he said, ‘had been construed as representing the considered attitude not of one Government but of six to the principle of compulsory arbitration and to the adherence or non-adherence to the Optional Clause of Article 36 of the Permanent Court of International Justice. The speaker wished to make it clear that, so far as the Government of the Irish Free State was concerned, that was not the position. The Government of the Irish Free State had not yet decided its attitude’ . . .<sup>2</sup>

and he went on to explain that, unlike the British Government, it was sympathetically inclined both to the principle of compulsory arbitration and to the Optional Clause. It is also important that the British

<sup>1</sup> *Records of the Sixth Assembly, Committee I.*, p. 22.

<sup>2</sup> *Ibid.*, pp. 24-5. Of this episode Keith says: ‘The effort, therefore,

to dominate in the League the decisions of the Governments of the Dominions may be regarded as effectively disposed of’: *Responsible Government*, 1928, ii. p. 892.

delegate immediately disclaimed all intention of speaking for the Dominion Governments.

A similar declaration of independence in the Assembly in respect of a similar matter of first-rate political importance was made, in circumstances very like those of the incident just described, by Mr. Michael McWhite, the Irish Free State delegate in the First Committee of the Ninth Assembly in 1928.<sup>1</sup>

There is also other evidence which must be noted of the equality of status of the Dominions in the Assembly.

First, their delegations are not diplomatically accredited by the King nor furnished with full powers prepared by the British Secretary of State for Foreign Affairs; on the contrary, they act simply under the appointment of, and with credentials furnished by, their own Governments at home. Nevertheless, like all other delegations, they enjoy the privileges of diplomatic immunity while they are on their service with the League.<sup>2</sup>

Second, the Dominion delegations receive instructions as to their action in the Assembly, not from the British Government, nor even through the channel of any of its departments, but direct from their Governments at home.<sup>3</sup> This, of course, is an indispensable result of the position they have claimed, and only continues the practice established at the Peace Conference in 1919. The seven British Empire delegations in fact hold meetings to discuss among themselves the major political issues that arise, but these meetings are without legal significance of any kind,<sup>4</sup> and they do not

<sup>1</sup> On September 21, 1928.

<sup>2</sup> Keith, *J.C.L.*, 1923, p. 164.

<sup>3</sup> This does not, of course, apply to the Indian delegation, which receives instructions from the India Office in London. But India is not a Dominion, and her whole position in the League is recognised to be abnormal.

<sup>4</sup> But cf. *infra*, pp. 144-7 and 165-8,

where the constitutional convention of mutual consultation is discussed. Other groups of Powers often hold similar private meetings among themselves during the Assembly for discussion of the issues that arise; e.g. the Latin-American Powers, whose delegations consult each other quite as much as do the British and Dominion delegations.

limit in any way the ultimate liberty of the Dominion delegates or their duty to obey the instructions they receive from their Governments.<sup>1</sup>

Third, the British and Dominion delegations are not grouped together in the Assembly Hall or at the tables round which the Assembly Committees do their work. On the contrary, their places are arranged in alphabetical order among the other nations, 'Afrique du Sud' sitting next to 'Albanie,' Canada to Chili, 'Nouvelle Zélande' to Norway, and so on. Similarly, they record their votes in the Assembly, when a vote is taken by roll-call, in their alphabetical order.

Fourth, the Dominion delegations receive their full share of places on the Drafting and other Sub-Committees which the Assembly Committees frequently set up.

Fifth, the Dominion delegations have been accorded posts of honour by the Assembly on a footing of complete equality with those of other Powers. Thus their representatives have been elected as presidents of committees, vice-presidents of the Assembly, and members of the Presidential Bureau. There has even been a President of the Assembly chosen from the Dominion delegations—Senator Dandurand of Canada.<sup>2</sup> This is the more striking since there is an unwritten convention in the Assembly that inasmuch as the Great Powers have permanent seats in the Council, no representative of a Great Power shall be elected President; it was never suggested that the fact that Great Britain was a Great Power should disqualify or in any way militate against the selection of a Canadian delegate to hold the highest office the Assembly has to give. There could be no more conclusive demonstration of

<sup>1</sup> For an interesting discussion of this point, *vide* Keith, *Responsible Government*, 1928, ii. pp. 836-7.

<sup>2</sup> At the Sixth Assembly in 1925.

the fact that the independence and the equality of the Dominion delegations in the Assembly are not a sham.

#### THE COUNCIL.

In virtue of paragraph 5 of Article 4 of the Covenant, the Dominions, being (normally) 'Members of the League not represented on the Council,' have the right to 'send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting [their] interests.' This right some of them have exercised on numerous occasions, when, as Mandatory Powers, they have sent their delegates to sit 'as members' of the Council for the consideration of questions connected with the Mandatory system. These precedents are of importance, because they have established the principle that the Dominions can have 'interests' of their own, separate from those which Great Britain represents.

The Dominions have another even more important right under paragraph 1 of Article 4: the right to be 'selected by the Assembly' as non-permanent Members of the Council. It is plain from the language of paragraph 1 of Article 4 that they have this right, since the Assembly is to select 'in its discretion,' and there is no indication of any kind that the Dominions are not equally eligible with other Members to be chosen. In spite of that, doubt has at various stages been expressed as to whether they are really eligible for election, and this doubt was at one time increased by language used by Sir Austen Chamberlain when, sitting in the Council as the delegate for the 'British Empire,' he appeared to claim that he was speaking in the name and on behalf of the Empire as a whole, including the Dominions. How, it was asked, if the Dominions are already represented in the Council by the British Government, can they claim to have another spokesman there as well?

The Dominions themselves, however, have never had any doubts about the matter. At the Peace Conference they secured on May 6, 1919, a special written guarantee, in the form of a Note addressed to Sir Robert Borden by Mr. Lloyd George, President Wilson, and M. Clemenceau, formally concurring in their view that they would be eligible for election.<sup>1</sup> Some years later, in 1926, in order to clear up misunderstandings created by some words of a British delegate, the chief Canadian delegate to the Seventh Assembly, Sir George Foster, declared that the Dominions 'considered that they had equal rights of representation in the Council and elsewhere with all the other fifty-five Members of the League.'<sup>2</sup> To clinch his argument, and prove the point by an actual precedent, the Irish Free State stood as a candidate for election at the same Assembly, and received ten votes. Finally, at the Eighth Assembly in 1927, Canada stood for election, received united British support, and was elected to serve on the Council for a period of three years. This event, says Toynbee, was welcomed in Canada 'as setting the final seal on Canada's autonomous nationhood.'<sup>3</sup>

It is important to note that a Member so elected to a

<sup>1</sup> This was required because the view had been put forward that since the 'British Empire' was permanently represented on the Council, this should suffice. Cf. *History of the Peace Conference of Paris*, vol. vi. p. 347 (Keith). The letter expressed the 'entire concurrence' of the three statesmen in the view that upon the true construction of Article 4 of the Covenant 'representatives of the self-governing Dominions of the British Empire may be selected or named as members of the Council.' Vide *Canadian Hansard*, liv. p. 89, cited by Hall, *British Commonwealth of Nations*, p. 341 n. For the text of the Note and an account of its genesis, vide David Hunter Miller, *The Drafting of the Covenant*, vol. i. p. 489. It

will be seen that the three statesmen wrote this interesting sentence: 'If there were any doubt, it would be entirely removed by the fact that the Articles of the Covenant are not subject to a narrow or technical construction.'

<sup>2</sup> Proceedings of the Seventh Assembly, September 15, 1926. Cf. Keith, *Responsible Government*, 1928 edition, p. 886: 'What is clear is that the British Empire delegation, which has a seat on the Council, is expected not merely to represent the view of the United Kingdom, but also those of the Dominions, so far as it is possible to ascertain them.' This view is difficult to reconcile with Sir G. Foster's speech and Canada's election.

<sup>3</sup> *Op. cit.*, p. 60.

non-permanent seat in the Council is chosen to represent there the wishes and the interests of the Assembly as a whole. Thus Canada has accepted the legal and constitutional position of being the chosen representative in the Council of those Members of the League who have no permanent place among its ranks.

It must be added that all that was said above concerning the full powers, instructions, etc., of the Dominion delegations to the Assembly applies equally to their delegates to the Council.

#### THE INTERNATIONAL LABOUR ORGANISATION.

The Dominions have the same position in the International Labour Organisation that they have in the League itself. They had to win it by the same kind of struggle in the Peace Conference as that by which they secured their status in the League; but their victory was equally complete. They are, of course, separate Members of the Organisation in virtue of their separate Membership of the League; they have rights identical with those of other Members in the Annual General Conference and its committees; they have pursued a wholly independent policy with regard to the International Conventions which the General Conference has drawn up, both in respect of the preparation of these conventions by the General Conference and in respect of their subsequent ratification. Canada has been elected by the Conference to a seat on the Governing Body, of which Great Britain is also a Member.

Dominion delegates to the International Labour Organisation, like Dominion delegates to other organs of the League, act under the sole authority of their own Governments, with no full powers or credentials but those which their own Governments provide, and on instructions which they receive from their respective Dominion authorities at home. Though there is, of

course, consultation among them, there has been no more tendency to 'group action' or voting by the British and Dominion delegations in the General Conference than there has been in the Assembly of the League.

TECHNICAL AND OTHER GENERAL INTERNATIONAL  
CONFERENCES HELD UNDER THE AUSPICES OF THE  
LEAGUE.

Since the League of Nations came into existence, the Council, acting as a rule on the suggestion of the Assembly, has summoned a large number of International Conferences of different kinds. These conferences have included the Financial Conference at Brussels, the Health Conference at Warsaw, the Economic Conference at Geneva, the Transit Conferences of Barcelona and Geneva, the White Slave Conference, the Opium Conference, the Arms Traffic Conference, the Obscene Literature Conference, and many more. These conferences, summoned under the authority of the League, now include, with very few exceptions, all the important International Conferences that are held. By the international law-making conventions which they prepare, they are doing practically all that is now being done by means of conventional 'legislation' to build up, develop, or amend the existing system of International Law. They are, in fact, adding to that system some new branches of great general importance.

In all these conferences, whether they be technical, political, or social, the Dominions hold the same position and exercise the same rights that they hold and exercise in the Assembly of the League. They send separate delegations, which act on their instructions from their own Governments at home, sign as separate contracting parties the conventions that are prepared, and in general have a status equal to that of any other delegation taking part.

### TECHNICAL AND OTHER COMMITTEES OF THE LEAGUE OF NATIONS.

The Council, acting on the proposal of the Assembly or of the International Conferences just mentioned, has from time to time created a number of Standing or Temporary Advisory or Technical Committees of the League. The functions which these committees fulfil in the general work of the League, and the part which they play in preparing the conventions which the International Conferences subsequently adopt, are most important.

In these committees the Dominions have had their full share of representation. There is no need to make a comprehensive list; a few examples will suffice. In the Financial Committee, which *inter alia* controls the reconstruction loans issued under the authority of the League, there is a South African; in the Supervisory Commission, which controls the estimates for the budget of the League, there is a representative of India; in the Temporary Mixed Commission, which dealt with disarmament and security, and which prepared the Draft Treaty of Mutual Assistance, the Arms Traffic Convention, and other documents, there was a Canadian; in the Opium Committee there is a representative of India; in the Transit Committee and the present Preparatory Disarmament Commission there are Canadians.

### RIGHT OF SEPARATE VOTE.

Article 3 of the Covenant provides that 'At meetings of the Assembly each Member of the League shall have one vote'; Article 4 provides that 'At meetings of the Council each Member of the League represented on the Council shall have one vote.'

The Dominions exercise with perfect freedom the right of separate vote which they have thus acquired.

Whatever the question under discussion, whether it be political, technical, or social, they cast their votes with the same independence as the other Members of the League.<sup>1</sup> They have, moreover, the same right of separate and equal vote in the General Conference and the Governing Body of the International Labour Organisation, in the other International Conferences summoned by the League, and in the Technical and Advisory League Committees.

Their policy, of course, is sometimes decided by the joint consultation with the other British Commonwealth delegations to which reference was made above. But often, too, these British Commonwealth delegations vote against each other, and sometimes they do so on matters of first-rate political importance. Thus, at the First Assembly, Canada voted for the admission of Armenia to the League, although the British delegation were against it; at the Second Assembly, South Africa led a movement for the admission of Albania to the League, although the British with the other Great Power delegations were against it—and South Africa was victorious; at the same Assembly, Australia refused to vote for the admission of Austria, although the other Dominions did so; at the Third Assembly, as above recorded, Australia and the other Dominions all voted

<sup>1</sup> 'In the Assembly and Council she [Great Britain] has no formal means of controlling the vote of any Dominion. To this extent the diplomatic unity of the Empire has gone by the board.' Smith and Corbett, *Canada and World Politics*, p. 112.

'Their admission to the League in their own right clearly implies that they are entitled to a large measure of independent action, so far as the text of the Covenant is concerned. There is indeed no limit to this independence, and the only limitations that will appear in practice will be those imposed by the common desire of Great Britain and the Do-

minions to keep the Commonwealth together.' Smith and Corbett, *ibid.*, p. 125. Cf. also Toynbee, *op. cit.*, pp. 52-3: 'If H.M.G. in Great Britain . . . had attempted to put pressure on the Governments of India and the Dominions in order to secure the uniform appearance of a united front at Geneva, then certainly the multiple representation of the Empire might have tended to produce a disruptive effect; for the Dominions and India would undoubtedly have resented any attempt to restrict their rights as League Members by private action behind the scenes.'

for the Norwegian motion for the intervention of the League to end the Greco-Turkish War, while Great Britain voted against it; when at the Seventh Assembly, the Irish Free State stood for election to the Council, it was generally believed that she did not receive the vote of Great Britain; at the Opium Conference of 1925-6 there was one moment at which India was pursuing alone a certain policy, the Dominions were unanimously with the United States against her, while the British delegation pursued uneasily a middle path between the two.

What has been said in the preceding paragraph does not apply to votes given in the Assembly or the Council under the provisions of Article 15 of the Covenant,<sup>1</sup> in any dispute in which Great Britain or a Dominion might be a party. Whether in such a case the Dominions would be free to cast their separate votes, or whether the Members of the British Commonwealth would all be regarded as automatically parties to the dispute, and their votes thus excluded from the majority or the unanimity required for an Assembly or a Council 'Report,' is a difficult and as yet an unsettled question. It will be discussed again in a later chapter;<sup>2</sup> in the meantime it is only necessary to add that if they were to be counted as automatically parties to the dispute, that, as Keith has rightly said, could not be regarded 'as a derogation from their position.'<sup>3</sup> It would, indeed, be a very natural result of the vitally important political and legal bonds that still subsist between the Members of the British Commonwealth.

The Dominions' right of separate vote was one of the reasons urged by the United States Senate for their rejection of the Covenant of the League. It is interesting to note the defence which was made for it against the

<sup>1</sup> Q.v., Annex I., p. 378, *infra*.

<sup>2</sup> Cf. pp. 324 *et seqq.*, *infra*.

<sup>3</sup> Vide *History of the Peace Conference of Paris*, vol. vi. p. 347.

American senators' arguments by the Canadian Minister for External Affairs, Mr. Newton Rowell. Speaking in the Canadian House of Commons on March 16, 1920, he said :

'No one Government in the Empire wages war, conscripts men, levies taxation, and negotiates peace. In the British Empire half a dozen Governments exercise these functions. . . . *As there are several self-governing nations in the British Empire, each is a Member of the League, and each is entitled to a vote.*'<sup>1</sup>

The Dominions, that is to say, must have the free and independent right of vote *precisely because they are 'self-governing nations'*; and the logic of the argument is irresistible, if the Dominions are to be Members of the League at all.

Certain writers who attach a great importance to the maintenance of what is called the diplomatic unity of the British Empire have argued that the right of separate vote has no great significance, because no substantive decision can be taken by any organ of the League except by unanimity.<sup>2</sup> The point is of doubtful force.

It could be argued, on the one hand, that the separate vote is of all the more importance because it gives the right of veto. The result of this right of veto is that on most matters of capital importance within the sphere of action of the League each of the Dominions would have in the last resort the legal right to paralyse the action of the League, even if Great Britain, all the other Dominions, and all the foreign Members were unanimously against it. In this sense, therefore, the right of separate vote is a most serious matter.

<sup>1</sup> *Hansard*, March 16, 1920, pp. 519-20. (My italics.)

<sup>2</sup> *E.g. Keith, Constitution, Administration, and Laws of the British Empire*, p. 51.

On the other hand, the right of separate vote is of no less importance by reason of the decisions that can be taken by majority in the various organs of the League. Under the Covenant both the Assembly and the Council have the right to make decisions of far-reaching effect by majority vote. Thus, for example, the Assembly can elect new Members of the League by a two-thirds majority; it can elect judges of the Permanent Court of International Justice and non-permanent Members of the Council by simple majority; the Council can make decisions in respect of disputes irrespective of the votes of the parties, and can appoint committees, etc., by simple majority. Moreover, some of these majority decisions which appear at first sight to relate to questions of secondary importance may at times of crisis be of decisive effect. Thus in 1921 a serious situation in Albania was solved and war averted principally by the sending of an impartial League Commission of Inquiry; the decision to send the inquiry was only not resisted in the Council by an interested Power because it would in any case have been taken by majority vote as 'a matter of procedure' under paragraph 2 of Article 5 of the Covenant. Moreover, it is also of real importance that in all the League Technical and Advisory Committees the work is done by majority vote.

But more significant still is the tacit development of majority rule in the Assembly. The Plenary Assembly rarely reverses the decisions which its Committees recommend; and in Committee very many of these decisions are taken by majority vote. Particularly in the Fourth Committee, which approves the budget, every doubtful item is decided by majority vote; the decisions taken obviously affect the general policy of the League; the Plenary Assembly, when it receives the budget which the Committee recommends, virtually

has the choice of accepting items which the Committee may have accepted by a majority, perhaps a majority of one, or of rejecting the budget as a whole. In fact, the budget is invariably accepted,<sup>1</sup> and in all probability it is only a matter of time before a League 'constitutional convention' will firmly establish this form of majority rule. In time the same thing may also happen in respect of majority decisions taken by the other Committees of the Assembly, while the beginnings of an analogous tendency can be discerned in the working of the General Conference of the I.L.O. and of the Technical and other conferences which the League convenes.

It would thus appear that from every point of view the right of separate vote which the Dominions exercise in all the organs of the League is of great and increasing importance.

#### RIGHT OF DIRECT CONTACT WITH THE ORGANS OF THE LEAGUE.

The Dominions, as Members of the League, have the right to communicate directly with its various organs and ancillary institutions—that is to say, with the Assembly, the Council, the Secretariat, the International Labour Office, the Permanent Court of International Justice, and the various League Committees and Commissions. In the early days of the League it was at one moment proposed by Sir James Allen, formerly Minister of Defence in New Zealand, and a good representative of the more 'conservative' view of inter-Imperial relations which has been predominant in that Dominion, that this right should not be exercised, but that instead the Dominions 'should transmit representations through Britain after consultation,' and that to this end a central Secretariat should be set up in London, through

<sup>1</sup> In fact on one occasion the full Assembly modified the Budget proposals of the Fourth Committee—by increasing the appropriation for Intellectual Co-operation in 1924.

which all the correspondence of the various Members of the British Commonwealth with the League should be conducted.<sup>1</sup> There can be no doubt that if this proposal had been adopted it would have had a profound effect on the nature of Dominion participation in the work of the League. But it was not adopted; it was refused by the other Dominions; and the fact of their refusal adds much to the significance of the use which they have made of their right of direct contact. In fact, the whole of their correspondence with the organs of the League is conducted in all respects by the same kind of machinery and in the same way as the correspondence of the foreign 'sovereign states' that are Members of the League.

It is of interest to note that, for the purpose of maintaining a closer contact with the League work in general, the Government of Canada has followed the example of a number of other foreign Members of the League, and has established a permanent Canadian Office in Geneva, with permanent officials who maintain personal liaison with the Secretariat and the International Labour Office, and who conduct or transmit their Government's correspondence with these organs.<sup>2</sup> Great Britain has no such office.

#### THE RIGHT OF INITIATIVE.

Under the Rules of Procedure adopted by the Assembly and the Council, every Member of the League

<sup>1</sup> *Times*, April 22, 1920, cited by Hall, *loc. cit.*, p. 343. Cf. the attitude of New Zealand with regard to diplomatic correspondence with foreign Powers. In 1921 the New Zealand Government refused to correspond directly with the Government of the U.S.A.: *vide infra*, pp. 144-5, and Lewis, *B.Y.I.L.*, 1922, p. 38. For a good statement of the New Zealand attitude and of its difference from that of the other Dominions,

*vide* J. B. Condliffe, *Great Britain and the Dominions* (Harris Foundation Lectures, 1927), pp. 372-81. Sir W. Harrison Moore also records (*ibid.*, p. 336) that certain Australian leaders, including Mr. Watt, saw a danger of disruption in a 'direct wire' for communications between Australia and Geneva.

<sup>2</sup> The first chief of this Office was Dr. Riddell.

has the right to lay before either of them 'any matter within the sphere of action of the League or affecting the peace of the world.'<sup>1</sup> The same right of initiative also exists in respect of League Technical or Advisory Committees, and of General International Conferences held under its auspices, provided of course that the matter laid before a conference or committee falls within its proper competence. Thus the Dominions are free to bring up for international discussion any subject whatever in which they take an interest, provided only that the subject is one which falls within the wide definition that has been quoted; and they are free to put forward proposals for action by the organs of the League or by the Governments of its Members, to suggest Commissions of Inquiry, the making of new international conventions, or other measures which they feel to be required.

This right of initiative has in fact been largely used by the Dominions, on technical, social, and political subjects, and not always after consultation with the Governments of the other Members of the British Commonwealth. Thus, in the early meetings of the Assembly, South Africa put forward constructive proposals on a great variety of subjects, and in 1920 took the lead in suggesting, in opposition to the publicly expressed desires of the British delegation, that the Report and Minutes of the Permanent Mandates Commission should be transmitted by the Council every year for discussion in the Assembly. The South African view prevailed, and its proposal has now become the established practice of the League. Similarly, in 1922, at the Third Assembly, New Zealand put forward a proposal for an inquiry into slavery in Africa, and successfully carried it through, although at the moment when it made its proposal and at some later stages it

<sup>1</sup> Paragraph 3 of Article 3 and paragraph 4 of Article 4 of the Covenant contain this definition of the competence of the Assembly and the Council.

had no support from Great Britain; the inquiry led ultimately to the making of the Slavery Convention by the Sixth and Seventh Assemblies in 1925-6, in the negotiation of which Great Britain took the lead. At the Third Assembly, the Australian delegate, Sir J. Cook, was instructed by the Commonwealth Government to propose the intervention of the League of Nations in the Greco-Turkish War, and would no doubt have done so had not the Norwegian delegation taken the initiative in doing so first.<sup>1</sup>

But most significant and most important of all uses by a Dominion of the right of initiative has been the action of Canada in respect of Article 10 of the Covenant. Since Article 10 deals with the undertaking of each Member of the League 'to respect and preserve as against external aggression the territorial integrity and existing political independence' of all other Members, it was in post-war Europe the most highly political subject which could possibly be discussed. At the First Assembly the Canadian delegation proposed the abrogation of Article 10; at the Second and Third Assemblies they substituted proposals for its drastic amendment; ultimately, at the Fourth Assembly in 1923 they introduced an 'Interpretative Resolution,' for which they secured the adhesion of all the Members voting except Persia, including all the great Powers then Members of the League. There were, however, a number of abstentions, but in spite of that fact the Resolution gave the Canadians adequate satisfaction, and by its substance was of vital interest to every loyal Member of the League. At no stage did Great Britain take any considerable share in the discussion; at one time the Canadian delegates were in open conflict with a considerable section of the Assembly, led by France; throughout they themselves conducted

<sup>1</sup> Vide Sir W. Harrison Moore, *Great Britain and the Dominions*, p. 339.

the debates and the negotiations which led to the ultimate result.<sup>1</sup>

#### RIGHT OF INTERVENTION.

Article 11 of the Covenant gives to every Member of the League the right to intervene in the disputes or differences of other Members, and 'to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.' It is under this Article that many disputes have in fact been brought before the Council, some of which involved a threat of war.

The Dominions, like other Members, have this vitally important political right. None of them as yet has used it, and it may be doubted whether at the present stage of the development of their international political position they will do so. It is more probable that if they desired action under Article 11 to be taken, they would consult the British Government and leave the responsibility of action to them. That political probability does not affect the fact of their legal right to take such action themselves if they desire to do so, as of course it is always possible that they may.

It is, moreover, of great importance that according to Sir W. Harrison Moore, himself on several occasions an Australian delegate to the Assembly, the Australian Government came very near to exercising this right of intervention in 1922 in connection with the Chanak incident described above. He records that Mr. Hughes, the Australian Prime Minister, telegraphed a reply to Mr. Lloyd George, promising military help at Chanak

<sup>1</sup> Cf. an authoritative article by M. Henri Rolin on Article 10 and the Canadian proposals in *Les Origines et l'Œuvre de la Société des Nations*,

edited by P. Munch, vol. ii. pp. 453-8. M. Rolin acted as rapporteur on the subject for the Assembly.

if it should be required, and that 'he then cabled to the Australian delegate at Geneva [Sir J. Cook] instructing him to bring the matter before the Assembly of the League, then in session.'<sup>1</sup> In fact before Sir J. Cook could act upon this instruction, Dr. Nansen of Norway had definitely proposed the intervention of the League for the purpose of restoring peace between Greece and Turkey. Sir J. Cook therefore confined his action to supporting Dr. Nansen's motion warmly. In this the other Dominions joined him, although the British delegation consistently opposed it to the end. Had Sir J. Cook acted on his instructions, it would of course have been in virtue of the right conferred upon Australia by Article 11.

RIGHTS IN RESPECT OF THE PERMANENT COURT OF  
INTERNATIONAL JUSTICE. (*Vide* also Note on  
p. 129, *infra*.)

Since the Dominions are Members of the League, they have the right, under paragraph 2 of Article 4 of the Statute of the Permanent Court of International Justice, to appoint 'national groups' of competent persons who shall be entitled to nominate candidates for election as judges and deputy-judges of the Court.<sup>2</sup> This right was not granted to them in the Jurists' Draft Statute

<sup>1</sup> *Great Britain and the Dominions*, p. 338. Cf. *supra*, p. 60. The full significance of the rights conferred by Article 11 is discussed in a special Report by the Council of the League, reprinted in Cmd. 2889 (1927).

<sup>2</sup> The text of Article 4 of the Statute of the Permanent Court of International Justice is as follows:

'The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions:

'In the case of Members of the League of Nations not represented

in the Permanent Court of Arbitration, the list of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

'No group may nominate more than four persons, not more than two of whom shall be of their own nationality. *In no case must the number of candidates nominated be more than double the number of seats to be filled.*'

laid before the First Assembly by the Council, the power of nominating being confined to States who were signatories to the Hague Arbitration Treaty of 1907. The Dominions, led by Canada, proposed amendments to place all Members of the League on an equal footing in this respect, and with British support they were successful.<sup>1</sup> They all of them exercised this right on the occasion of the first election of the Court at the Second Assembly in 1921. The Statute of the Court provides that each national group may nominate not more than four candidates, 'not more than two of whom shall be of their own nationality.' But in the Dominions the question immediately arose as to what persons were of Dominion 'nationality.' Who, for example, is a Canadian 'national'? Do all British subjects fall within this definition in whatever part of the Empire they may live? <sup>2</sup> Canada decided in 1921 that for this purpose they do *not*, and even went so far as to pass special legislation on the subject, known as the Canadian Nationals Definition Act, 1921, the purpose of which, in Professor Keith's words, was 'to obviate any contention that every British subject is a Canadian national.'<sup>3</sup> There can be no doubt that by passing this legislation the Canadians were acting in accordance with the intention of paragraph 2 of Article 4 of the Statute; and in fact, in making their nominations in 1921, all the Dominions, although they did not pass similar legislation, acted in accordance with the principle on which the Canadian Act was based.<sup>4</sup>

<sup>1</sup> Vide *Records of the First Assembly*, Committee Meetings, pp. 335 *et seqq.*

<sup>2</sup> This raises a large question, as to which *vide infra*, pp. 217 *et seqq.*

<sup>3</sup> *Constitution, Laws, and Administration of the British Empire*, p. 52.

<sup>4</sup> A difficult point arises out of Article 10 §2 of the Statute, which provides that if 'more than one national of the same Member of the

League' are elected, only the eldest shall be considered elected. It is said by Pollak (*A.J.I.L.*, 1926, pp. 714 *et seqq.*) that many Canadian and other Dominion 'nationals' are also of 'British Empire nationality' in International Law, and might thus be excluded. If Article 10 §2 were thus applied, it would defeat the purpose of the authors of the Statute, which, as shown by their acceptance of the

It is of interest to note that although no judge or deputy-judge was elected from among the Dominion nominees, Sir Robert Borden was a serious candidate whose name was carefully considered before the election actually took place.

It is also necessary to note that if a dispute were to arise in which a Dominion were a party, in which, that is to say, it desired to contest the case itself and not to leave the matter in the hands of the British Government, it would have the right under Article 31 of the Statute to nominate 'a judge of its nationality' to sit as a member of the Court for the purposes of this dispute. A comparison of the texts of Article 4 and Article 31 of the Statute,<sup>1</sup> and of the use of the word 'nationality' in both, makes it plain that, since a Dominion has the right to make nominations under Article 4, it has equally the right to 'select or choose' a 'judge of its nationality' in a dispute, provided only, as said before, that it decides that it is 'a party.'<sup>2</sup> There can be little doubt that in a case in which a Dominion interest was involved, the Government of the Dominion concerned would nowadays decide that it was a party, for not to do so would stultify the

Dominions' amendment, was to put all Members of the League on an equal footing in this regard; cf. pp. 360 *et seq.*, *infra*. *Vide* also Note on p. 129, *infra*.

<sup>1</sup> *Vide* footnote to p. 102.

<sup>2</sup> The text of Article 31 is as follows:

'(i) Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

'(ii) If the Court includes upon the bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates, as provided in Articles 4 and 5.

'(iii) If the Court includes upon the bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

'(iv) Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

'(v) Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.' (A. Fachiri, *Permanent Court of International Justice*, p. 247.)

whole policy which the Dominions have consistently pursued.<sup>1</sup>

In some cases, moreover, a Dominion would automatically be a party to a dispute, whether it desired to be so or not; *e.g.* if a Dominion which is a Mandatory Power were summoned before the Court by another Member of the League under the clause in its mandate which provides for compulsory reference of disputes to the Permanent Court (*vide, e.g.*, Article 7, paragraph 2, of the New Zealand Mandate for Samoa). It is inconceivable that in such a case Great Britain would intervene; New Zealand, for example, would be the defendant, and the sole defendant, in a dispute concerning its administration of Samoa; and it would therefore have the right to nominate a 'judge of its nationality.'

A less straightforward case would arise in a dispute in which both British and Dominion interests were involved; but it would seem that then, under paragraph 4 of Article 31 (*q.v.*, p. 104, note 2), the Dominion would have no claim to nominate a 'judge of its nationality,' if, as at present, a judge of British nationality was already a member of the Court. This, however, would not result from the fact that the Dominions were Members of the British Commonwealth, but merely from the fact that they were joint parties in the same cause, as different sovereign states quite often have been in international litigation.<sup>2</sup> Their rights, in fact, so far as the Court was concerned, would be exactly the same as those of other Members of the League; but their exercise of those rights would depend, as always, on their free political judgment in each case as it arose.

<sup>1</sup> As to whether a Dominion can be a party to an international dispute, *vide* Chap. VII. pp. 324 *et seqq.*, *infra*.

<sup>2</sup> *E.g.* Great Britain, France, Italy, and Japan were joint parties, and made a joint application to the

Court, in the *Wimbledon* case against Germany heard by the Permanent Court of International Justice in 1923. *Vide* Fachiri, *op. cit.*, p. 166. Cf. also Keith, *Responsible Government*, 1928 ed., ii. p. 1047. •

## THE RIGHT TO HOLD A MANDATE FROM THE LEAGUE.

Three Dominions, Australia, New Zealand, and South Africa, are among the seven Members of the League which hold mandates from the League for the administration and good government of backward peoples under the terms of Article 22 of the Covenant. In some respects their rights and duties as Mandatory Powers furnish the most striking example of their separate and equal position in the League.<sup>1</sup>

They hold authority in the territories entrusted to their charge in virtue of mandates conferred upon them in their own name and right by the Council of the League. The preamble of the New Zealand mandate, for example, reads as follows :

‘ The Council of the League of Nations. . . .

‘ Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I. (Covenant of the League of Nations) of the said treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Dominion of New Zealand to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms ; and

‘ Whereas His Britannic Majesty, for and on behalf of the Government of the Dominion of New Zealand, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions ; . . .

‘ Confirming the said Mandate, defines its terms as follows . . . ’

Thus New Zealand has given a pledge in her own name

<sup>1</sup> For a valuable account of the facts relating to the Dominion Mandates, *vide* Keith, *Responsible*

*Government*, 1928 edition, vol. ii. pp. 1049-63.

to the Council, and through the Council to the Members of the League as a whole, that she will observe the terms of her mandate; her responsibility is individual, accepted by her own act and deed, a direct responsibility towards all the other Members.<sup>1</sup>

Were there any doubt on these points, it would be resolved by the terms of the Nauru Mandate, which was conferred not upon any Dominion or upon Great Britain, but upon the 'British Empire,' with the understanding that it would be administered jointly by Great Britain, Australia, and New Zealand.

The direct and separate responsibility of the Dominion Mandatory Powers towards the League is exemplified in every phase of the working of the mandate system. The Dominions, naturally, control their mandated areas without any interference or control by the British Government; they make their annual reports on their administration direct to the League, without previous consultation with the British Colonial Office; they appoint their own Dominion delegates to explain, defend, and amplify their Reports before the Permanent Mandates Commission; their Assembly delegations defend their actions as mandatories when the Assembly discusses their Reports. Thus, when in the Third Assembly a negro delegate from Haiti criticised the action of the South African Government in respect of the Bondelzwarts rebellion in 1922, and moved a resolution on the subject, the South African delegation alone replied to the charges which he made, and from first to last conducted the whole of the case both in Committee and in the Plenary Assembly, while the British delegation made no attempt to defend South

<sup>1</sup> In fact, New Zealand, true to her 'conservative' traditions, originally desired to take her mandate through the intermediary of the British Government; but, says Lewis, 'in consequence of the atti-

tude adopted by South Africa and Australia, the mandates were issued direct.' *B.Y.I.L.*, 1922-3, p. 33. For fuller details see *Round Table*, September 1921, pp. 961-6.

Africa or to share its responsibility in any way.<sup>1</sup> Again, at the Eighth Assembly a New Zealand delegate alone spoke in answer to inquiries that were made concerning the disturbances in Samoa in 1927.<sup>2</sup>

From every point of view, therefore, in law, in theory, and in practice, the three Dominion Mandatory Powers hold a position of completely individual and separate international responsibility. It must be added that this responsibility lies in a sphere—the government of backward peoples—which is of great international importance at the present epoch in the history of Western civilisation.

The above description of the international rights of the Dominions as Members of the League must now be completed by a brief description of their international obligations. These obligations may be dealt with more briefly, since there has so far been little practice to illustrate their working.

#### OBLIGATIONS UNDER ARTICLE 8.

The Dominions share with the other Members of the League the important obligations concerning the reduction and limitation of national armaments contained in Article 8. These obligations involve an undertaking to participate in carrying into effect a reduction of armaments ‘to the lowest point consistent with national safety, and the enforcement by common action of international obligations,’ by means of ‘plans’ (of course in the form of an international treaty) which the Council is to ‘formulate . . . for the consideration and action of the several Governments.’ The Members also undertake to ‘interchange full and frank informa-

<sup>1</sup> *Records of the Assembly*, 1922, the Haitian proposal.  
Plenary Meetings, pp. 38, 76, 81,  
152, 155, 160. It is worth noting

<sup>2</sup> *Records of the Assembly*, 1927,  
Committee VI., pp. 19, 20.

tion' about their armaments, their programmes, and such of their industries as are adaptable to warlike purposes.

The political importance of these obligations needs no emphasis. Of course, in their fulfilment the Members of the British Commonwealth would act in consultation with each other. Moreover, it must be remembered that for the purposes of the Disarmament Treaty to be made the British and Dominion forces would in all probability be reckoned as a single unit. This course was adopted at the Washington Naval Conference of 1921, and at the Coolidge Naval Conference of 1927,<sup>1</sup> and it may be expected that the same plan will be adopted in any general disarmament treaty that may be made, at least in respect of naval armaments.

But these considerations do not affect the fact that the Dominions have a separate and individual responsibility for their participation in the fulfilment of Article 8. It was for that reason that the members of the Temporary Mixed Commission, which considered plans for the application of Article 8 during the years 1921-4, included a Canadian; similarly the present Preparatory Disarmament Commission has a Canadian member. It is, moreover, worth while to note that at the so-called 'Coolidge Conference' of 1927, at which naval armaments were discussed, the Dominions insisted on sending separate delegations to take part.

Lastly, when the Irish Free State was admitted as

<sup>1</sup> Cf. *infra*, p. 246. Cf. also the following extract from the Report of the Canadian delegate to the Washington Conference: 'There is, it will be noticed, no express provision as to the application of the Treaty to the existing or future navies of the Dominions; and it is apparent that no such provision was necessary. From the point of view of the other Powers the navies of the Empire must necessarily be

counted as a single force in estimating the ratio of strength. At the outbreak of the late war and throughout its course they did in fact combine as a single force. . . . ' Canadian Parliamentary Papers, No. 47, 1922, p. 23, cited by Hall and Lowell, *op. cit.*, p. 631. It does not seem absolutely certain that the same principle would be applied to land armies or to air forces.

a Member of the League in 1923, the Assembly Committee, in accordance with the regular procedure, inquired into the Free State armaments exactly as they have inquired into those of every 'sovereign state' that has been admitted before or since.<sup>1</sup>

#### OBLIGATIONS UNDER ARTICLE 10.

Article 10 of the Covenant reads as follows:

'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.'

It is plain that under this Article the Dominions have both rights and obligations of the highest political importance. They have a right to claim the assistance of all the other Members of the League should their territorial integrity or their existing political independence be subject to attack. If they believe that there exists even the threat or danger of such attack, they have the right to call upon the Council to make plans by which their safety and their territory may be preserved. And this is an absolute right; the terms of the article are explicit: 'the Council *shall* advise upon the means by which this obligation shall be fulfilled.' Since national security against aggression is plainly the first of national interests, the political importance of these rights needs no emphasis.

Such rights as these, depending as they do on reciprocal undertakings among the Members of the

<sup>1</sup> *Records of the Assembly*, September 10, 1923. Article 1 provides that an admitted Member must 'accept such regulations as may be prescribed by the League in

regard to its military, naval, and air forces and armaments.' It is in pursuance of this provision that the Assembly's inquiries are made.

League, involve obligations that are no less important. The purpose of the Article is to prevent changes of the existing territorial and political *status quo* by means of violence. But violence, aggression, if it occurs, can only be restrained by counter-violence, by armed defence; and the obligation to participate in such armed defence against a violent attempt to change the *status quo* lies on every Member of the League. That obligation, with all the consequences it involves, the Dominions have voluntarily, individually, and in their own name accepted. Again, of course, the question of whether the obligation applies as between the Members of the British Commonwealth *inter se* must be reserved.<sup>1</sup> What is clear and certain is that, *vis-à-vis* the non-British Members of the League, the Dominions are individually and separately bound by the undertakings of Article 10.

The obligation is, of course, what Westlake called 'imperfect.' It requires, that is to say, supplementary agreements at the moment of its application to make it effective—agreements which it is the duty of the Council to arrange. But the fact that it is 'imperfect' does not make it any the less a binding and particularly solemn obligation. It was because they felt it to be so serious that Canada proposed the deletion, amendments and interpretations to which reference was made above.<sup>2</sup> The Canadian Government was inspired, as their spokesman at the Fourth Assembly, Sir Lomer Gouin, said, 'par le désir de savoir exactement ses responsabilités, ses obligations.' Perhaps there is no better method of showing the view taken of these obligations by the Dominions, and the serious character of the obligations

<sup>1</sup> Cf. *infra*, pp. 305 *et seqq.* and pp. 338-41. Professor Keith has argued that the obligations of Article 10 are, by their very nature, a proof that the Covenant cannot apply to relations of the Members of the British Common-

wealth *inter se* (vide *Constitution, Administration, and Laws*, pp. 48-9). The argument is not wholly satisfying.

<sup>2</sup> For a brief account of the Canadian proposals vide Toynbee, *op. cit.*, pp. 56-8.

themselves, than that of quoting the text of the resolution accepted by Canada at the Fourth Assembly, *for which the Dominions and Great Britain unanimously voted*, and which the British Government went out of its way to adopt in a Memorandum to the Arbitration and Security Committee of the League in January 1928 : <sup>1</sup>

‘The Assembly, desirous of defining the scope of the obligations contained in Article 10 of the Covenant so far as regards the points raised by the Canadian delegation, adopts the following Resolution :’

‘It is in conformity with the spirit of Article 10 that, in the event of the Council considering it to be its duty to recommend the application of military measures in consequence of an aggression or danger or threat of aggression, the Council shall be bound to take account, more particularly, of the geographical situation and of the special conditions of each state.

‘It is for the constitutional authorities of each Member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of Members, in what degree the Member is bound to assure the execution of this obligation by employment of its military forces.

‘The recommendation made by the Council shall be regarded as being of the highest importance, and shall be taken into consideration by all the Members of the League with the desire to execute their engagements in good faith.’ <sup>2</sup>

Moreover, some at least of the Dominions have recognised the possible practical importance of these obligations. Discussing the effect of the Locarno Pacts in

<sup>1</sup> *Vide* L.N. Document C.A.S. 10, 1928, p. 56 : ‘This interpretation is in harmony with the views of H.M.G. in Great Britain, who regard the article, while of great sanctity, as the enunciation of a general principle.’

<sup>2</sup> For an admirable and authori-

tative discussion of the origins and history of this Resolution and of the scope and meaning of Article 10, see the article referred to above by H. Rolin, in Munch, *Les Origines et l'Œuvre de la Société des Nations*, vol. ii. pp. 453-88.

the Canadian House of Commons in April 1928, Mr. Lapointe made the following reference to Article 10 :

‘I am free to admit that, as a Member of the League, Canada has certain obligations, and if she is ever called upon to fulfil them, or if there is war in regard to any of these boundaries, Canada must consider her obligations as a Member of the League.’

It is significant that later in his speech he expressly repudiated the suggestion that Canada must fight in every war in which Great Britain might be involved, and that he ended by using the following words : <sup>1</sup>

‘I believe that the present constitution of the British Commonwealth is more secure and can be better safeguarded by acknowledging that all the citizens of the different parts of the Commonwealth have equal status and are free to look after their own affairs.’

#### OBLIGATIONS UNDER ARTICLE 11.

Under paragraph 2 of Article 11, the Dominions have the obligation, implied by the right of intervention which the Article confers, not to resist a reference to the Assembly or the Council of the League of any dispute in which they may happen to be involved, or of any circumstance affecting them which threatens to disturb international peace or good understanding.

Under paragraph 1 of the same Article they have an implied obligation to co-operate, when there is a threat of war, in the ‘action that may be deemed wise and effectual to safeguard the peace of nations.’ It must be noted that the words of this paragraph are imperative: ‘The League *shall* take any action,’ <sup>2</sup> etc. The obligation on individual Members of the League, therefore, although only implied, is nevertheless quite plainly binding.

<sup>1</sup> Vide *Times*, April 14, 1928.

<sup>2</sup> Vide Annex I., pp. 376-7, *infra*.

The nature of the action that may be required under this Article has recently been defined in a Report prepared by a special sub-committee of the Council.<sup>1</sup> The Report shows that the obligations of Article 11 might in practice be exceedingly effective for the prevention of war, and therefore among the most important which the Covenant involves. The measures indicated by the Committee as falling within the meaning of Article 11 include, among others, the withdrawal of diplomatic agents from the capital of a Member threatening war, the withdrawal by the Parties to a dispute of troops, etc., from certain areas which the Council might prescribe, participation in general naval or aerial demonstrations, etc. The obligations of Article 11 are therefore a serious matter.

#### OBLIGATIONS UNDER ARTICLES 12-15.

Under Articles 12-15<sup>2</sup> the Members of the League accept a complicated series of obligations for the pacific settlement of their international disputes by conciliation, arbitration, or judicial settlement, and for the restraint of their liberty to go to war. The effect of the obligations is too well known to require detailed explanation; it is enough for the present purpose to say that they allow recourse to war only in two cases, and that neither case can arise until methods of pacific settlement have been attempted for a prolonged period of time, and have failed to produce an agreed solution of the question in dispute.

It has been said that these obligations in no way concern the Dominions, first because no Dominion will ever have a dispute in which it will be a party, as distinct from Great Britain; second, because the obligations do not apply to the relations of Great Britain and the Dominions *inter se*; and, third, be-

<sup>1</sup> Reprinted in Cmd. 2889 (1927).      <sup>2</sup> *Q.v.*, Appendix I., pp. 377-9, *infra*.

cause in any case no Dominion has under British constitutional law the right to go to war.

Such a statement is an evident exaggeration. With regard to the first of the three points made, it has already been argued above that disputes will certainly arise in which Dominions will be litigants in their own name and right; the other two points, which are by no means so obviously true as has been claimed, will be dealt with in later chapters. But whatever may be the limitations, if there are any, on the direct responsibility of the Dominions for the fulfilment of these obligations of Articles 12-15, they are limitations which derive *exclusively* from British constitutional law and practice, and with which the non-British Members of the League are not concerned. These non-British Members have the right to demand that the Dominions, like other Members of the League, shall submit their international disputes, if they have any, to the Council, to arbitration, or to the Permanent Court; that they will observe the other stipulations of the Covenant concerning the settlement of these disputes and the recommendations or verdicts that are agreed to; and that they will in no case take up arms unless and until the conditions of Article 15 have been fulfilled. And the Dominions on their side, as Members of the League, have separate and individual obligations to ensure that there shall be no breach of the stipulations of Articles 12-15, obligations that are wholly unaffected by the constitutional machinery by which in practice they may be fulfilled.

#### OBLIGATIONS UNDER ARTICLE 16.

The same general observations apply to the obligations of Article 16,<sup>1</sup> under which every Member of the League undertakes :

<sup>1</sup> Q.v., Appendix I., p. 379, *infra*.

First, to subject a Covenant-breaking state to the severance of all trade or financial relations and to other forms of boycott and blockade.

Second, to allow and facilitate the passage through its territory of troops acting on behalf of the League.

Third, to support other states acting in defence of the Covenant in the financial and economic measures taken under the Article.

Fourth, to participate in the military measures which may eventually be required to restrain the aggression that has occurred. The obligations 'to furnish 'effective military, naval, or air force,' arising as they do from paragraph 5 of Article 16,<sup>1</sup> are, like those of Article 10, 'imperfect,' requiring supplementary arrangements to bring them into actual operation; but the language of the paragraph is none the less imperative—the Council 'recommends' what force 'the Members of the League *shall* severally contribute to the armed force to be used to protect the Covenant of the League'—and the highest authorities are agreed that the Article involves a binding if imperfect obligation to give some measure of military assistance, should it be required.

The gravity of these undertakings in a Society of States where sudden aggression is still regarded as a serious possibility, against which nations make every effort to prepare, requires no emphasis. These undertakings the Dominions have severally and individually given to the non-British Members of the League. That the Dominions recognise the nature of these undertakings, and of their several responsibility in relation to them, has been shown by the correspondence exchanged between the United States Government and the Governments of the Dominions about the Kellogg Treaty for the Renunciation of War. It had been suggested in the

<sup>1</sup> Paragraph 2 in the original text; paragraph 5 in the text as amended at the Second Assembly.

course of this correspondence and in the earlier negotiations on the subject that the proposed treaty might be inconsistent with the fulfilment by the Members of the League of their duties under Article 16. On this point the Government of South Africa wrote as follows :

‘ In expressing their willingness to be a party to the proposed treaty, His Majesty’s Government in the Union of South Africa take it for granted—

‘ (a) . . .

‘ (b) . . .

‘ (c) That provision will be made for rendering it quite clear that it is not intended that the Union of South Africa, by becoming a party to the proposed treaty, would be precluded from fulfilling, as a Member of the League of Nations, its obligations towards the other Members thereof under the provisions of the Covenant of the League.’<sup>1</sup>

This use of language is most significant. In view of the discussions which have taken place in recent years in regard to obligations involved in Article 16, it is relevant also to the present purpose to point out that they are founded on a draft of ‘ Sanctions ’ Articles prepared by the so-called Phillimore Committee appointed by the British Foreign Office in 1917. This draft, dated March 20, 1918, reads as follows :

‘ Article 2.—If, which may God avert, one of the Allied States should break the covenant contained in the preceding Article, this state will become, *ipso facto*, at war with all the other Allied States, and the latter agree to take and to support each other in taking jointly and severally all such measures—military, naval, financial, and economic—as will best avail for restraining the breach of covenant. Such financial and economic measures shall include severance of all relations of trade and finance with the subjects of the covenant-breaking state, prohibition against the subjects of the Allied States entering

<sup>1</sup> Vide *Times*, June 16, 1928 : cited by Wheeler Bennett, *Renunciation of War*, p. 133.

into any relations with the subjects of the covenant-breaking state, and the prevention, so far as possible, of the subjects of the covenant-breaking state from having any commercial or financial intercourse with the subjects of any other state whether party to this Convention or not.

‘For the purpose of this Article, the Allied States shall detain any ship or goods belonging to any of the subjects of the covenant-breaking state or coming from or destined for any person residing in the territory of such state, and shall take any other similar steps which shall be necessary for the same purpose.’

‘Such of the Allied States (if any) as cannot make an effective contribution of military or naval force shall at the least take the other measures indicated in this Article.’

The comment made by the Phillimore Committee on this draft is as follows :

‘Article 2 contains the sanction proposed. We have desired to make it as weighty as possible. We have, therefore, made it unanimous and automatic, and one to which each state must contribute its force without waiting for the others, but we have also recognised that some states may not be able to make, at any rate in certain cases, an effective contribution of military or naval force. We have accordingly provided that such states shall at the least take the financial, economic, and other measures indicated in the Article.’

The draft, strengthened in certain respects, was inserted into the Draft Covenant prepared by the British delegation to the Peace Conference, and dated January 20, 1919.<sup>1</sup> It was on the basis of Articles 12-14 of chapter ii. of this Draft Covenant that Article 16 was prepared. These facts make the obligations of Article 16 of particular sanctity and importance to the Members

<sup>1</sup> These documents are all published in the third volume of Ray Stannard Baker, *Woodrow Wilson and World Settlement*, part iii., pp. 67 *et seqq.* Also in D. H. Miller, *op. cit.*, vol. ii. pp. 3 *et seqq.*

of the British Commonwealth which have since become Members of the League.

#### OBLIGATIONS UNDER ARTICLES 18 AND 20.

Article 18 provides that 'Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat, and shall as soon as possible be published by it.'

The Dominions have already on a large number of occasions carried out their duty under this provision, and have done so in their own name and right. Thus the Governments of Canada, Australia, South Africa, and of the Irish Free State have registered all their own ratifications of the conventions drawn up by the International Labour Organisation;<sup>1</sup> the famous Halibut Treaty of 1923 between Canada and the United States was registered by the Canadian Government acting alone; and many other examples could be cited. The fact of the effective fulfilment of this obligation by the Dominions on a number of occasions is of evident importance in the consideration of Dominion status in International Law, and in particular in relation to their acquisition of the right to make international treaties.<sup>2</sup>

Under Article 20 the Members of the League agree never to enter into engagements inconsistent with the Covenant, and to procure release from any of their previously existing obligations which may be inconsistent with its terms. No case has yet arisen in which these provisions have come into practical application.

#### OBLIGATIONS UNDER ARTICLES 23 AND 24.

These two Articles provide a constitutional basis, if the phrase may be allowed, for the general inter-

<sup>1</sup> Cf. *infra*, pp. 179-81.

<sup>2</sup> Cf. *infra*, pp. 183 *et seqq.*

national co-operation of the Members of the League in the technical, economic, social, and other analogous spheres. Article 23 deals with such matters as Labour Conditions, the Treatment of Native Populations, the White Slave Traffic, the Traffic in Drugs, the Traffic in Arms and Ammunition, Transit and the Equitable Treatment of Commerce, and the Prevention and Control of Disease. Article 24 deals with International Bureaux and Commissions existing or to be created. It is under these Articles that many of the technical and other conferences referred to above have been summoned and held, and that the technical and other organisations and commissions have been established. The Dominions have played their full part in the varied and widespread international co-operation which has thus been brought about, and, as was shown above, have done so as wholly separate units and in their own name and right.<sup>1</sup>

#### OBLIGATIONS UNDER ARTICLE 6.

Article 6 deals in general with the organisation of the Secretariat of the League, and it provides that the expenses of the League 'shall be borne by the Members of the League in the proportion decided by the Assembly.'<sup>2</sup>

It is important that for all purposes connected with the allocation of expenses the Dominions have been treated in all respects in the same way as the other Members of the League. No modification of any kind was made or even suggested in their respective contributions on the ground of their connection with the British Empire. A change from the original basis of allocation adopted in the Covenant in 1919 was made by the Second Assembly; this change was strenuously

<sup>1</sup> Cf. *supra*, pp. 90-2.

<sup>2</sup> Amendment to Article 6 adopted

by the Second Assembly, September 1921.

urged and supported by the Dominions. For international 'taxation' purposes, therefore, the Dominions have in practice as in theory established rights and duties equal to those of other Members of the League.

It should also be noted that in their choice of personnel for the Secretariat and the International Labour Office, both the Secretary-General of the League and the Director of the International Labour Office have always held that citizens of the Dominions must not be counted as citizens of Great Britain, but that the Dominions are entitled as separate Members to their own quota of places on the staff. The point is one both of theoretical interest and of practical importance in the working of the League.

Such are the rights and obligations of the Dominions as Members of the League of Nations. What measure of personality in International Law can they be said to confer? Are the Dominions persons of International Law at all? Have they a real 'status' of their own or not?

It may be convenient to begin the discussion of these questions with a definition of status, and to borrow that definition from M. Rolin, whose general doctrine about the personality of the Dominions will be considered later:

'Le Statut des Dominions n'est pas autre chose que leur état et leur capacité en droit public et en droit international.'<sup>1</sup>

Add to this definition that of legal 'personality' in general given by Sir F. Pollock:

'Persons are the subjects of rights and duties; and as the subject of a right, a person is the object of the

<sup>1</sup> Vide *R.D.I.*, 3rd Ser., vol. iv. (1923), p. 197.

correlative duty, and conversely . . . *A person is such . . . because rights and duties are ascribed to him.* The person is the legal subject or substance of which rights and duties are attributes.' <sup>1</sup>

These definitions together bring out the points on which it is necessary here to fix attention: the actual *capacity* of the Dominions to exercise rights and to be bound by obligations; the fact that 'rights and duties are ascribed' to them; and the effective recognition of that capacity, of these rights and duties, first in British constitutional law and practice, second by the great majority of, if not by all, the states which are the subjects of International Law.

These definitions, taken with the facts given above about the position of the Dominions in the League of Nations, would seem to indicate an inevitable answer to the question whether the Dominions have any personality in International Law. This conclusion is that they have such personality, and have it in a most important measure. But before that conclusion is supported by further argument, it may be useful to cite the opinions of some of the authorities who have already written on the subject. For the most part these opinions are not developed in any detailed exposition, but they have none the less their full value as the judgment of their respective authors.

Oppenheim :

'Without doubt, therefore, the admission of these four self-governing Dominions to the League of Nations gives them a position in International Law. . . . But the place of the self-governing Dominions within the Family of Nations at present defies exact definition, since they enjoy a special position, corresponding to their special status within the British Empire.' <sup>2</sup>

<sup>1</sup> *First Book of Jurisprudence*, pp. 110-11. (My italics.)

<sup>2</sup> *International Law*, vol. i. (3rd ed., 1920), 94a, 94b.

A. Pearce Higgins :

‘That the self-governing Dominions, have acquired something of an international personality by reason of their Membership of the League of Nations seems clear, but how much is not so evident. They are treated as independent in their relations to the business of the League, but for other purposes they would appear only to have made good a claim to be consulted on important matters affecting the whole of the British Empire, while each Dominion is consulted as regards matters of special import to itself.’<sup>1</sup>

A. Berriedale Keith :

‘In the League of Nations . . . the Dominions and India have actually received a measure of international personality alongside of the British Empire. . . . In all matters arising out of the League compact they deal as independent units. . . . In respect of Membership of the League the Dominions and India have a special status which may justly be termed international. But this status is confined to League matters, although the future alone can decide how far it extends. . . .’<sup>2</sup>

M. M. Lewis :

‘As far as the League is concerned, they have the same rights and duties as independent States. . . . The Dominions have acquired a definite international status, the real difficulty being to define the nature of such status.’<sup>3</sup>

Lewis also speaks of ‘the individual international personality of each of the Dominions.’<sup>4</sup>

Fauchille :

‘Appelées à participer directement à l’élaboration et à la signature d’un acte de haute politique internationale et introduites dans la famille organisée des nations, il

<sup>1</sup> Hall’s *International Law*, 8th ed., by A. Pearce Higgins, 1924, p. 35.

<sup>2</sup> *J.C.L.*, November 1923, p. 165.

<sup>3</sup> *B.Y.I.L.*, 1922-3, pp. 32-3.

<sup>4</sup> *Ibid.*, p. 31.

paraît difficile de mettre en doute que ces dépendances de la Grande Bretagne doivent être désormais qualifiées de personnes de droit international.' <sup>1</sup>

M. Henri Rolin, in an elaborate and most ingenious argument, denies that the entry of the Dominions into the League of Nations has effected 'un changement essentiel' in their status. He admits that the other Members of the League 'ont reconnu à quatre Dominions la qualité d'états,' but he denies that in British constitutional law they have secured effective recognition for any international rights; and he concludes:

'On se trouve en présence d'une fiction conventionnelle, limitée à l'objet poursuivi par le pacte de la Société des Nations.' <sup>2</sup>

Rolin's constitutional doctrine will be dealt with in detail in another connection later on.<sup>3</sup> Apart from him, it will be seen that all the authoritative writers who have been quoted are agreed that in virtue of the Dominions' Membership of the League of Nations they have now a definite status or personality in International Law. They would appear also to agree that this personality is at least commensurate with the rights and obligations of their Membership, the indefiniteness of its extent arising largely from the fact that at the time when these writers formed their opinions it seemed to them uncertain how important, relatively to the other rights and obligations of International Law, the rights and obligations of the Covenant would in practice be. None of them except Rolin, not even that great authority A. B. Keith, questions that this Dominion status has received effective recognition in

<sup>1</sup> *Traité de Droit international public*, tome i<sup>er</sup>, i<sup>ère</sup> partie, 1922, p. 221.

*de Législation comparée*, 3rd Ser., vol. iv., 1923, 'Le Statut des Dominions,' p. 223.

<sup>2</sup> *Revue de Droit international et*

<sup>3</sup> Cf. pp. 183-91, *infra*.

British constitutional law;<sup>1</sup> also they all clearly and definitely hold that it has received effective international recognition from the great body of sovereign states. On this latter point even Rolin goes so far as to say that the other Members of the League have recognised that the Dominions have 'la qualité d'états.' In other words, all these writers except Rolin agree that the Dominions' capacity for international rights and obligations within the framework of the League of Nations has been effectively recognised both in British public law and in International Law, and that therefore their legal status in the Society of States is at least to that extent clearly and finally established.

It seems plain, with deference to Rolin, and subject to his special argument, which will be dealt with later on, that these conclusions cannot really be resisted. The Dominions have the numerous and important international rights and obligations described above. They have exercised these rights and fulfilled these obligations in a vigorous and independent manner for nine years. For the whole of that period, upon hundreds of different occasions, they have had the effective recognition of the British Government for their international position. Not only so, but in public pronouncements by statesmen in office, in resolutions of the Imperial Conference, and especially in the Report of the Imperial Conference adopted in 1926, they have had at least as formal a recognition of their new position as has been given to most of the important constitutional changes made in British institutions in modern times. In a community where constitutional law is modified in its application by constitutional practice so readily and so rapidly as it is in all

<sup>1</sup> For a more extended discussion by Keith of Dominion Membership in the League of Nations, vide *Re-*

*sponsible Government*, 1928 edition, vol. ii. pp. 882-93.

British countries, it is surely impossible to deny that the practice of the last nine years constitutes effective recognition. Moreover, it is inconceivable that any British Government could ever in the future seek to take away or to diminish these international rights which the Dominions have exercised for so considerable and so momentous a period of time. This being so, it is straining language to the breaking point to say, as Rolin says, that, so far as British constitutional law is concerned, their international position rests upon a fiction.\* If we are really in the presence of a fiction (which is not clear),<sup>1</sup> that fiction lies rather in the historic formulæ of British constitutional phraseology on which M. Rolin largely rests his case. And those formulæ cannot prevail against the declarations and the practice of the last nine years. It must therefore be concluded that effective constitutional recognition of the separate Membership of the Dominions in the League has taken place.

To that British constitutional recognition has been added the international recognition in a solemn legal instrument of the forty-nine foreign 'sovereign states' that have accepted the Covenant of the League. This recognition, again, has been confirmed and consolidated by nine years of incessant and creative practice in the institutions of Geneva. Since this is so, there can surely be no doubt that, in accordance with the definitions of legal personality given by Rolin and Pollock, and in the full measure of the rights and obligations of Membership of the League of Nations, the Dominions are persons of International Law.

Some authors, admitting this conclusion, go even further and maintain that the admission of the Dominions to the League involves their recognition as virtually full

<sup>1</sup> Cf. *infra*, pp. 188-91.

'sovereign states.' Oppenheim, be it noted, did not say this. Writing in 1920, before the practice of succeeding years had clarified the situation, he expressly said that their admitted status in the League did not necessarily mean a vital change in their international position outside the League. Fauchille, however, went a good deal further. 'L'admission d'un organisme dans la Société des Nations,' he says, 'entraîne sa reconnaissance comme état, puisque les pouvoirs qui sont confiés aux Membres de la Société des Nations impliquent qu'ils ont, non pas seulement la jouissance, mais encore l'exercice des droits d'un état.' Fauchille, in other words, maintains that the Dominions, by virtue of their admission to the League, have become complete persons of International Law, with full rights in all its various départements. Rolin supports Fauchille to the extent of saying that the other non-British Members of the League have recognised in the Dominions 'la qualité d'états.' And so far as this, indeed, it is possible and perhaps necessary to accept Fauchille's doctrine. For it may well be argued that a Government which has agreed to receive a Dominion as an equal Member of the League has thereby debarred itself from refusing to recognise the exercise by that Dominion of any other right in International Law which it may choose to claim. To such an argument there is no obvious answer.<sup>1</sup>

But that is only one side of the question. Before it can be agreed that the Dominions have full rights not only in the legal system which the Covenant has created amongst the Members of the League, but in the whole sphere of International Law in general, it must be shown that M. Rolin's second condition has been fulfilled; that, in addition to the international recognition of foreign Powers, effective recognition of Dominion capacity for these general rights of Interna-

<sup>1</sup> Cf. Chap. V., pp. 205-6, *infra*.

tional Law has been accorded in British constitutional practice. And several of our writers emphatically deny that any such recognition in British practice has yet been given. Pearce Higgins does so plainly in the passage quoted above.<sup>1</sup> Keith roundly asserts that their status 'is confined to League matters.'<sup>2</sup> Lewis expresses a little philosophic doubt.<sup>3</sup> Rolin is insistent that the 'fiction' of their status is limited 'à l'objet poursuivi par le pacte.'<sup>4</sup>

This view, in its substance, will be contested on other grounds in the succeeding chapter. But for the present purpose it is necessary to admit that these authors are at least so far right, that the admission of the Dominions to the League does not in itself imply the recognition in British constitutional practice of any international rights to the Dominions beyond those which result from the Covenant of the League. The effect of the admission of the Dominions to the League *may* extend beyond the limits of the Covenant and into the sphere of International Law in general, but it can only do so when those who control British constitutional practice have made plain beyond dispute their intention that it shall.

It must be agreed, then, that the international status of the Dominions which results from their admission to the League is limited, as Rolin says, to the purposes for which the Covenant was made. But what are those purposes? Do they not cover all the vital international relations of the vast majority of the Members of the Society of States? Do they not cover their relations in matters of peace and war, security for their territorial integrity and political independence, the peaceful settlement of all their international disputes, their joint co-operation for the promotion of their

<sup>1</sup> *Vide supra*, p. 123.  
<sup>2</sup> *Vide supra*, *ibid.*

<sup>3</sup> *Vide supra*, *ibid.*  
<sup>4</sup> *Vide supra*, p. 124.

common social, technical, and economic interests, their joint action for the extension and codification of the rules of International Law—above all, the political and constitutional development of the permanent institutions of ‘the organised Family of Nations’? In all this vast domain of international relationship the Dominions have separate and individual rights and obligations. They have, therefore, as the result of their admission to the League—and this conclusion can be stated without doubt or hesitation—a measure of legal personality in International Law of wide extent and capital importance.

#### NOTE TO CHAPTER IV

The points discussed on pages 102-5, and especially on page 103, note 4, were debated on March 19, 1929, in the League of Nations Committee of Jurists for the Revision of the Statute of the Permanent Court of International Justice. On that occasion the British Member of the Committee made a most important declaration, reported as follows in the *Times* of March 20, 1929:—

‘Sir Cecil Hurst reopened the question of whether, under the Statute, Dominions forming part of the British Empire were entitled to claim that Judges of their nationality should sit on the Bench for questions in which they were concerned. Sir Cecil Hurst held that both the Statute and the Constitution of the British Empire left no room for doubt that the Dominions had this right, and that this right was not exhausted by the presence of a British Judge.’

This authoritative statement, made officially in an international conference, strongly supports the argument in the text above. The point was in fact left unsettled by the Jurists’ Committee, as it exceeded the mandate they had received from the Assembly.

In the same discussion the United States Member of the Committee, Mr. Elihu Root, himself an ex-Secretary of State, made an equally important declaration. He ‘reminded the Committee that the United States *had already recognised a separate national personality* for various integral parts of the British Empire, in exchanging diplomatic representatives with Canada and the Irish Free State.’

## CHAPTER V

### THE INTERNATIONAL JURIDICAL SITUATION OF THE DOMINIONS IN THE GENERAL SPHERE OF INTERNATIONAL LAW

IN the consideration of the international juridical situation of the Dominions in respect of the general sphere of International Law outside the scope of the League of Nations, there is one document that all authorities will agree to be of principal importance—the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, a Committee which has often since been spoken of by the name of its chairman, Lord Balfour. This document, which was not only adopted unanimously by the full Imperial Conference itself, but which was subsequently approved by the Parliaments of all the Dominions, has, it will be argued later, settled many questions and laid a solid basis for future growth. There were many questions for it to settle, because, prior to its publication, the political and constitutional events described in Chapter III. were interpreted in very different ways by different schools of thought. Some authorities, as has been shown above, held that the position accorded to the Dominions at the Peace Conference made them at once and in all respects the equals of other nations; while other authorities held that, except for their rights and duties as Members of the League of Nations, their international status was unaffected in any way.

Thus, on the one side, General Smuts had declared :

'Where in the past British Ministers could have acted for the Dominions in respect of foreign affairs, in future ministers of the Union will act for the Union. *The change is a far-reaching one, which will alter the whole basis of the British Empire. . . . We have received a position of absolute equality and freedom, not only among the other states of the Empire, but among the other nations of the world.*'<sup>1</sup>

Similarly, Mr. Hughes, the Prime Minister of Australia, had declared about the same time :

'By this recognition' (involved in separate representation at the Peace Conference) '*Australia became a nation, and entered the family of nations on a footing of equality.*'<sup>2</sup>

These declarations by Dominion Prime Ministers, who were themselves, be it remembered, actually engaged in the Peace Conference negotiations, are remarkably categorical and plain.

On the other side, Keith had expressed himself in terms no less categorical than those of General Smuts and Mr. Hughes. Writing in 1923, he analysed the claim put forward by General Smuts, and argued that, if it were accepted :

'It would follow that there would be a real and fundamental change in the constitution of the Empire since the Armistice'

(as, indeed, General Smuts had claimed there was),

'and that no treaty arrangement could be entered into affecting any autonomous part of the Empire without the deliberate action of the Government of that part. A further deduction is that each autonomous part of the Empire is capable of exercising, in independence of the other parts, the treaty-power as regards itself.'<sup>3</sup>

<sup>1</sup> Debate in the Union Parliament on the ratification of the Treaty of Versailles, September 1919. Cited by Keith, *J.C.L.*, vol. v., November 1923, p. 161. (My italics.)

<sup>2</sup> *Hansard*, Australia, September 10, 1919, pp. 12, 169. (My italics.)

<sup>3</sup> *J.C.L.*, vol. v., November 1923, p. 162.

Keith denied that any of these changes had in fact taken place: 'Internationally,' he said, the proceedings of the Peace Conference, and in particular the Dominion signatures of the peace treaties, were 'indifferent,'<sup>1</sup> and he concluded: 'That internationally, apart from League of Nations proceedings, the Dominions have no status apart from the Empire seems clear.'<sup>2</sup>

Keith is supported by Pearce Higgins, who in 1924 wrote thus:

'For the general purposes of International Law, except for League of Nations proceedings, it is not believed that any one of the self-governing Dominions possesses international personality apart from the whole of the Empire.'<sup>3</sup>

The conflict of interpretation and opinion prior to the Imperial Conference Report of 1926 was therefore clear and sharp, and it is against the background of this conflict that the Report itself, and its effect upon the international status of the Dominions, must be considered.

As with the Covenant, so with the Report of 1926, there are some preliminary points which require discussion before the concrete questions of Dominion status can be taken up.

These points relate to the legal and constitutional nature and importance of the Report. Why was the Report ever drawn up? What was the purpose of those who drafted it, and the purpose of the Imperial Conference in adopting their draft? What is its character as a constitutional instrument? What will be its practical effect on the constitutional practice of the British Commonwealth?

<sup>1</sup> *J.C.L.*, vol. v., November 1923, p. 164.

<sup>2</sup> *Ibid.*, p. 167.

<sup>3</sup> Hall's *International Law*, 8th ed., by A. Pearce Higgins, 1924, p. 35.

The answer to the first of these questions, why the Report was drawn up, is to be found in a speech made by General Hertzog, the Prime Minister of South Africa, on May 28, 1926. It was General Hertzog who, together with the representatives of Ireland, demanded that the item of Inter-Imperial Relations should be placed on the agenda of the Conference; it was he who pressed throughout for the adoption of a constitutional statement such as that which the Report contains; and on May 28, 1926, he thus explained his reasons for doing so :

‘General Hertzog said that uncertainty about the actual status of the Dominions in relation to foreign countries was leading to repeated friction, and it was necessary to have the position cleared up. His view was that a declaration should be made to foreign nations on the point, a declaration which would necessarily emanate from London. The nations were saying to the Dominions :

“ You want us to act in such and such a way, but do not forget that we as a friendly state cannot treat with you as you want us to do, because we have no official indication of what your position is, and only when we receive such an indication can we treat you as an international independent state.”

“ Unless,” added General Hertzog, “ our status is acknowledged by foreign nations, we simply do not exist as a nation.”

‘General Hertzog’s point is that, as things are, there is a great source of suspicion, not only in South Africa, but in the other Dominions, “ that the Dominions are in danger of losing certain of their rights. If that fear is not taken away it will lead in comparatively few years to the destruction of the Empire.” ’<sup>1</sup>

General Hertzog supplemented this speech with

<sup>1</sup> In the South African House of Assembly. Reported in the *Times* of May 29, 1926.

another, made at the opening of the Imperial Conference itself, which must also be quoted :

‘South Africa,’ he said, ‘is anxious to possess that will [to live in the Empire], . . . but that can be assured for the future only if she can be made to feel implicit faith in her full and free nationhood upon the basis of equality with every other member of the Commonwealth. That implicit faith she does not possess to-day, but she will possess it the moment her independent national status has ceased to be a matter of dispute and has become internationally recognised. I hope, therefore, that this question of the status of the Dominions, which concerns their own communities no less than the world at large, will receive due consideration by this Conference.’<sup>1</sup>

The purpose, then, of the Report, in the eyes of those who desired its preparation, was to secure ‘international recognition’ for the ‘independent national status’ of the Dominions. By this they did not mean the severance of their connection with the British Empire, nor their recognition as ‘full sovereign states.’ On the contrary, General Hertzog spoke repeatedly of their ‘will to live in the Empire,’ and of their connection with the Empire as a connection which they ‘assumed to constitute a relationship that will last.’<sup>2</sup> But they wanted international recognition of a national status which would give them, although they remained within the Empire, rights which they could freely exercise on their own behalf in their relations with foreign states. That and nothing less was the purpose of the statesmen who placed the item of Inter-Imperial Relations on the agenda of the Imperial Conference. For this reason it is particularly significant that those same statesmen should have subsequently expressed their fullest satisfaction with the terms of the Report.

<sup>1</sup> Imperial Conference, 1926. Proceedings. Cmd. 2769, p. 25.  
 Appendices to the Summary of      <sup>2</sup> Cmd. 2769, p. 24.

Such being the purpose of the Report, what is its character as a constitutional instrument ? .

There were not wanting those, of course, who claimed that the Report had wrought a total revolution in the nature of the British Commonwealth. M. Tielman Roos, for example, who represents advanced Nationalist thought in the Union of South Africa, declared that the Report removed the necessity for secession, since it opened the way to sovereign independence within the Empire.<sup>1</sup> Others have held that, on the contrary, it means no real change at all, since it does no more than codify and confirm constitutional changes which had already taken place. This was the view put forward by General Smuts,<sup>2</sup> and no less emphatically by the Prime Minister of Canada, Mr. Mackenzie King :

‘Long before my departure for the Imperial Conference,’ said Mr. Mackenzie King, ‘I believed that Canada was an autonomous country within the British Empire . . . in no way subordinate to other parts of the Empire in its domestic or external affairs. . . . If it is true that the Imperial Conference, so far as the constitutional position of Great Britain and the Dominions is concerned, has established nothing new, it is equally true that it has given a new force and a new significance to the position. This position now bears the imprimatur of an Imperial Conference unanimously expressing the opinion of all the parts of the British Empire concerning the fundamental principles on which the Empire is founded. . . . That categorically ends the long struggle for independent responsible government and the recognition of the nationhood of all the Dominions. That marks a new era in the regulation of Imperial problems, whether they relate to the relations of the different parts of the Empire among themselves, or to their relations with foreign countries.’<sup>3</sup>

<sup>1</sup> Cited by Keith, *J.C.L.*, February 1927, 3rd Ser., vol. ix., part i., p. 85.

<sup>2</sup> *Ibid.*

<sup>3</sup> Speech at Toronto, February 4, 1927. Cited by Lavoie, *Revue générale de Droit international public*, March-April, 1927, p. 207.<sup>9</sup>

This declaration may be supported by a second, made by another distinguished Canadian statesman. Speaking in London on June 14, 1927, Sir Robert Borden said: 'The Report has usefully crystallised in terms the effect of existing conventions applicable to all the Dominions, but which in some communities at least were imperfectly understood, or not fully realised.'<sup>1</sup>

The answer to the question whether the Report went beyond existing practice, or whether it merely confirmed and codified certain constitutional conventions which the British Governments had previously accepted, must depend on the view that is taken of the facts of history described in Chapter III. But General Smuts, Mr. Mackenzie King, and Sir Robert Borden are a trio of imposing witnesses as to what that view should be. Their joint authority gives strong ground for holding that the importance of the Report lay not in new principles which it introduced, but in the formal recognition, confirmation, and perhaps elaboration of conventions founded on the principles accepted in 1917 and 1919. The Report, in other words, was 'rather epoch-marking than epoch-making.' It gave a new force and new significance to rights, and, above all, to international rights, which the Dominions had previously begun to exercise.<sup>2</sup>

To say that is not to diminish the practical importance or the practical effect of the Report. Its practical effect was to lay a solid constitutional foundation in British public law for the general international legal rights which the Dominions will henceforward exercise.

<sup>1</sup> *Journal of the R.I.I.A.*, July 1927, p. 206.

<sup>2</sup> Cf. also H. D. Hall: 'For the most part the Report sums up constitutional principles and arrangements already more or less clearly established by existing precedents.

. . . Like Magna Carta the Report professes rather to declare the ancient custom of the last few years, than to draft a new constitution for the British Commonwealth.' *British Commonwealth of Nations*, Lowell and Hall, 1927, pp. 591-6.

It is true, of course, that before these rights can be put into practical application executive or legislative action by the Dominion Governments or Parliaments is required. The Imperial Conference is not a legislative, nor even an executive body, and its Report, therefore, can have neither legislative nor executive effect. Before a Dominion legation can be set up, formal 'advice' by the Dominion Cabinet to the King, and a vote of money by the Dominion Parliament, are clearly needed. What the Report did was to establish in British public law the constitutional right of the Dominion Governments or Parliaments to take such decisions or to make such votes, if they desire to do so. There is no need to emphasise the importance of what it thus accomplished. Definitions were quoted above from high authorities to the effect that "status or personality" in International Law consists in the capacity to exercise rights or to be bound by obligations, but that to be effective such capacity must have received recognition, first, in national constitutional law and practice, and secondly, by the great majority, if not by all, the states which are the subjects of International Law.<sup>1</sup> The Dominions, as General Hertzog argued, could not confidently or satisfactorily claim international legal or diplomatic rights unless their title to do so had been put beyond all question by some formal recognition in British constitutional law. That service the Report of 1926 has rendered to the Dominions, and it must therefore be regarded as a document of first-rate constitutional importance.

It may seem strange to Continental critics that such a claim should be made for a simple Report of only eighteen printed pages, prepared by a sub-committee of the Imperial Conference and adopted by the Plenary Conference without change of any kind. Had its

<sup>1</sup> Cf. *supra*, pp. 121-2.

contents been entirely new in principle and detail, its authority perhaps would not have been the same. But since it primarily declared accepted, though admittedly incipient, practice, its force within its scope is scarcely less than that of formal statute law. It is a solemn declaration of the constitutional rules which the autonomous Governments of the British Commonwealth are now unanimously resolved to follow. It will bind their action in the future in the sense that none of them will ever dream of trying to override the rules or principles which it contains. Thus it has confirmed the change in constitutional law which had previously begun, and by its formal public recognition of their existence it has given a firm foundation in British public law to those international rights of the Dominions with which it deals. Moreover, it must be remembered that the adoption of the Report by the Imperial Conference was, after all, quite as solemn a way of establishing new constitutional practices as the procedure by which responsible government was first granted to the Dominions, or as that by which the Imperial Conference was set up.<sup>1</sup> It cannot be denied, indeed, that the Report is as important and decisive a constitutional document as the despatch to the Governor of the Colonies in Canada by which the Durham policy was carried out.

It follows from what has just been said that the Dominions are now effectively entitled in British constitutional law to that status in general International Law which the Report allows them. What is this status in general International Law? What international rights, in addition to those conferred upon them by the Covenant of the League, do they enjoy? By what international obligations are they bound?

<sup>1</sup> Cf. discussion of constitutional conventions in British public law in Chap. I, pp. 2-7, *supra*.

## THE GENERAL POSITION OF THE DOMINIONS IN THE SYSTEM OF THE BRITISH COMMONWEALTH.

It is necessary to begin the discussion of these rights and duties by a brief consideration of the basic principles on which the Report was founded. These principles govern all its terms, and finally determine the general nature of the constitutional position which the Dominions will henceforward be recognised to hold in the system of the British Commonwealth.

After a formal introductory section consisting of a single paragraph, the Report opens with a definition of this position. It says that Great Britain and the Dominions constitute 'a group of self-governing communities,' whose 'position and mutual relation may be readily defined.' '*They are,*' it continues in italics, '*autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.*'<sup>1</sup>

This definition, it must be noted, contains a number of different points:

First, Great Britain and the Dominions constitute a 'group' described as 'the British Commonwealth of Nations.'

Second, the Members of this group are 'freely associated,' but are also 'united by a common allegiance to the Crown.'

Third, the Members of this group, so united, are also 'within the British Empire.'

Fourth, they are 'equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs.'

<sup>1</sup> Section II. of the Report, entitled 'Status of Great Britain and the Dominions.' Cmd. 2768 (1926), p.

14. For the text of the Report, *vide* Appendix II., pp. 385 *et seqq.*, *infra*.

Each of these points is most important in its different way. The first three of them, however, will require consideration, not in this chapter but in Chapter VI., when the nature of the legal and constitutional links between the Members of the British Commonwealth will be discussed. In this chapter, where the status of the Dominions in the general sphere of International Law is to be dealt with, it is the fourth element in the definition to which attention must be turned.

It is in the expression of this fourth point, moreover, that the most important words in the whole Report are used. These words contain the fundamental and dynamic principle on which every other section of the Report has been based. Without them, the document would not make sense. They are the constitutional recognition without reservation of any kind of the 'equality of status' of the Dominions, and of equality of status carried to its utmost logical extent.<sup>1</sup>

It is true that Keith appears to doubt the real importance of these words. In an analysis of the Report made in 1927 he categorically concludes that, in spite of the definition now being discussed, 'it is misleading to talk of complete equality' between Great Britain and the Dominions.<sup>2</sup> It is consistent with that conclusion that in his analysis he should minimise the general effect of every part of the Report. But with deference to so great an authority, it appears to be impossible to accept Keith's conclusion. The plain language of the italicised definition adopted by

<sup>1</sup> Cf. Hall, *British Commonwealth of Nations*, Lowell and Hall, 1927, p. 615: 'The Balfour Report carries to its logical conclusion the doctrine of equality of status in relation to the Crown set forth in the Borden memorandum of 1919.'

<sup>2</sup> *J.C.L.*, February 1927, 3rd Ser., vol. ix., part i., p. 86. The leader

of the Conservative Opposition in the Canadian House of Commons, Mr. Bennett, has made several speeches in which he has used similar language, e.g.: 'Equality of status was a high-sounding phrase, but it could not properly represent the existing position, and he deprecated the continued use of wrong nomenclature.' *Times*, May 30, 1928.

the full Imperial Conference is against him. Great Britain and the Dominions, it says, are 'equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs.' Nor does that categorical statement stand alone. The succeeding paragraphs of Section II. of the Report support it by a number of additional propositions as clear and as precise as the definition itself, and even more far-reaching in their implications. Thus we read: 'Every self-governing member of the Empire is now the master of its destiny. *In fact, if not in form, it is subject to no compulsion whatever.*'<sup>1</sup> And again: 'Every Dominion is now, and must always remain, *the sole judge of the nature and extent of its co-operation*' with the other Members of the Commonwealth.<sup>1</sup> Finally, in the last paragraph of this Section II. the Committee, summarising the discussion in which these sentences appear, say this: 'Equality of status, so far as Britain and the Dominions are concerned, is thus the *root principle* governing our inter-Imperial relations.'<sup>1</sup> This, indeed, is the very essence of the 'political theory' which the Committee state, and which in the succeeding sections of the Report they have 'endeavoured to apply to our common needs.'<sup>2</sup> It is this 'root principle' of equality of status that governs all the terms of the Report, and it is with that principle continually in mind that its succeeding sections must be discussed.

Only a part of one section of the Report will be dealt with in the present chapter. Section IV., for example, is entitled 'Relations between the various parts of the British Empire,' and it treats of the position of Governor-General, the operation of Dominion legislation, and so on; while it has an important indirect effect

<sup>1</sup> Cmd. 2768 (1926), p. 14. (The italics are mine.)  
*Ibid.*, p. 15; *vide* p. 387, *infra*.

on the international status of the Dominions, it nevertheless falls within the scope of Chapter VI. Sections VI. and VII., relating to the 'System of Communication and Consultation' between different Members of the British Commonwealth, and to 'Particular Aspects of Foreign Relations discussed by the Committee,' are political rather than legal or constitutional in character.<sup>1</sup> Section v., entitled 'Relations with Foreign Countries,' contains some points which are still obscure or controversial, and which will, therefore, more conveniently be kept for discussion in Chapter VII. 'It is to the more straightforward parts of Section v. that attention will here be given.

Section v. is in substance, and indeed in form as well, a continuance of the work done by the Imperial Conference of 1923 on the subject of the relations of the self-governing parts of the Empire with foreign countries. In 1923 discussion had been confined to the single topic of the 'negotiation, signature, and ratification of treaties' with foreign Powers, but on that topic a most important Resolution had been adopted.<sup>2</sup> Again, in 1926, the longest and perhaps the most notable sub-section of Section v. of the Imperial Conference Report is concerned with 'Procedure in relation to Treaties.' This sub-section amplifies and clarifies the principles laid down in the Resolution of 1923 in respect of treaties, and applies them to all the questions that may arise concerning the power of the Dominions to make treaties for themselves, or to participate in general treaties with the other Members of the British Commonwealth. The remaining sub-sections of Section v. are concerned, in the words of the Balfour Committee, with 'the possibility of applying the principles underlying the Treaty

<sup>1</sup> But *vide infra*, pp. 283-8.

<sup>2</sup> This Resolution is quoted in full in a footnote to Section v.,

Cmd. 2768 (1926), p. 20; *vide p.* 392n., *infra*.

Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally,'<sup>1</sup> and with considering whether these principles 'could not be applied with advantage in a wider sphere.'<sup>2</sup>

It will be convenient, however, and it will also make for greater clearness, to consider the Resolution of 1923 and Section v. of the Report of 1926 together rather than apart. It will also be convenient not to follow rigidly the order of discussion in the Report, but to take first the more general principles laid down, and afterwards their detailed application to specific rights.

#### GENERAL CONDUCT OF FOREIGN POLICY.

Sub-section (c) of Section v. of the Report is entitled 'General Conduct of Foreign Policy.' It consists of a single paragraph of print, twenty-three lines long, but it contains some propositions of wide general importance and one sentence of startling frankness.

First, it recognises in plain terms that 'practically all the Dominions are engaged to some extent and some to a considerable extent in the conduct of foreign relations.'<sup>3</sup> It goes on to state that 'the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations, except with the definite assent of their own Governments.'<sup>3</sup> Then it says that the principle of Sub-section (a), concerning the negotiation of treaties, which will be discussed shortly,<sup>4</sup> and which may be summarised in the phrase 'adequate prior consultation,' might 'usefully be accepted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.'<sup>5</sup>

<sup>1</sup> Cmd. 2768 (1926), p. 25.

<sup>2</sup> *Ibid.*, p. 21.

<sup>3</sup> *Ibid.*, p. 26.

<sup>4</sup> *Vide infra*, pp. 165-8.

<sup>5</sup> Cmd. 2768 (1926), p. 26.

These sentences, taken together with the rest of Section v., appear to establish clearly two principles generally applicable to the whole conduct of foreign policy by Great Britain and the Dominions.

The first is that the Dominions have the right to start negotiations with foreign Powers on their own initiative and on any subject which they deem to 'fall within their respective spheres.' This right is subject to the new 'constitutional convention' now recognised, which imposes the duty of prior 'consultation,' in virtue of which the Governments of the other Members of the British Commonwealth must be informed before negotiations are actually begun, and must be given the opportunity to participate in the negotiations if they so desire.<sup>1</sup> But this convention, the practical application of which, as will later on appear, is still in some respects obscure, in no way overrides the right of the Dominions to start negotiations with foreign Powers on any subject, commercial, technical, or political, on which they feel negotiations to be required. It is relevant to point out that the existence of this right had been formally disputed by a Dominion Government as recently as 1921. The question whether New Zealand had the right to enter into separate and direct negotiations with the U.S.A. arose in that year, and in a letter to the American Consular Agent the Acting Prime Minister of New Zealand then declared as follows:

'The Dominion of New Zealand does not assume authority to communicate directly with the Government of the United States or of any country other than Great Britain, and it is an invariable rule that communications from any foreign country to the Government of New Zealand must be in the form of communications to the Government of Great Britain,' etc.<sup>2</sup>

<sup>1</sup> Cf. pp. 165-8, *infra*.

<sup>2</sup> Letter of Sir F. Bell, July 8, 1921, cited in *Round Table*, December

1921. In 1924 Professor Keith wrote as follows: 'The [Dominion] Governments . . . in diplomatic

It is safe to say that even in 1921 this doctrine would not have received approval from the Governments of all the other Dominions. But in any case the Report of 1926 has swept away the doubts which the New Zealand Government entertained. There is now no question that the right of the Dominions to enter into *direct* negotiations of any kind has been established, or that it may be exercised whether the purpose in view is the making of a treaty, the settlement of an international dispute, the conclusion of an administrative agreement, or merely an exchange of views. The importance of this right in giving the Dominions international 'status' needs no emphasis.

The second principle laid down by the sentences above is that *neither Great Britain nor a Dominion* can be committed in any negotiation, whether the negotiation be for a treaty or for any other purpose, to the acceptance of active obligations without its own consent. The principle, of course, was not formulated for the first time in the Report of 1926; the Prime Minister of Great Britain, Mr. Baldwin, had declared it in the plainest terms in the Imperial Conference of 1923, when in his opening statement to that Conference he said: 'We stand here on an equal footing, and no Government present in this Chamber can bind the rest.'<sup>1</sup> It is perhaps of most importance in its application to the making of international treaties, and it will therefore require further examination when the subject of treaties

negotiations must act through the Imperial Government or its diplomatic representatives.' Vide *Constitution, Administration, and Laws of the British Empire*, p. 51 n. It may also be noted that the right of the Dominion Governments to negotiate with foreign Powers is not dependent in any way on the establishment of Dominion Legations. A. Lawrence Lowell has written: 'If we [the U.S.A.] wish to deal with Australia alone, there being no

interchange of diplomats between us, we must do it through the British Ambassador. In doing so, we are not dealing with the Government of Great Britain, but through the Ambassador solely for, and under the instructions of, the Government of Australia.' Lowell and Hall, *op. cit.*, 1927, p. 588.

<sup>1</sup> Imperial Conference, 1923. Appendices to the Summary of Proceedings, Cmd. 1918 (1923), p. 11.

is discussed. But it is also significant that it should be so clearly stated in Sub-section (c) of Section v. in connection with foreign policy as a whole, and that there should be express provision that Great Britain should not be committed by a Dominion without the specific consent of the British Government, just as no Dominion can be committed by Great Britain. This, no doubt, is a necessary consequence of the right of the Dominions to initiate negotiations of any kind with foreign Powers, but the detailed statement that equality between Great Britain and the Dominions in this respect must 'work both ways' is not without importance.

These two principles or rights, first to initiate any kind of international negotiation, second to be bound by no active international obligation without specific and previous consent, are rights which follow as a necessary consequence from the 'root principle' of equality of status discussed above. But the plain and categorical recognition which they are given in Sub-section (c) of Section v., and their application there to the 'general conduct of foreign policy,' are most important in the consideration of the international status which the Dominions have acquired. And the significance of that recognition and that application is increased by the remarkable sentence with which Sub-section (c) begins: 'It was frankly recognised,' this sentence runs, 'that in this sphere ['conduct of foreign affairs generally'], as in the sphere of defence, the major share of responsibility rests now and *must for some time continue to rest*, with His Majesty's Government in Great Britain.'<sup>1</sup> This language shows how great has been the revolution both in practice and opinion since the speech which Mr. Asquith made on the conduct of foreign policy to the Imperial Conference of 1911.<sup>2</sup> It shows, too, that the

<sup>1</sup> Cmd. 2768 (1926), p. 26. (The italics are mine.)      <sup>2</sup> Cf. *supra*, p. 51.

Governments of the British Commonwealth to-day do not ignore the prospect that the part played by the Dominions in the life and politics of the international Society of States will rapidly increase, and that the day can even be envisaged when the 'major share of responsibility' for foreign policy may pass from the hands of Great Britain to those of the Dominions overseas.

#### THE RIGHT OF LEGATION.

Another important landmark in the development of the international status of the Dominions is the recognition in the Report of their right to enter into separate diplomatic intercourse with foreign Powers if they so desire. That recognition is contained in Sub-section (c) of Section v., entitled 'Channel of Communication between Dominion Governments and Foreign Governments.'

It may be said that this recognition is again nothing new, but is merely the formal confirmation of a right that had been granted to the Dominions years before. It is true that in 1920 the British Government had agreed to the establishment of a separate Canadian legation in Washington. It is true that this had been claimed by some authorities to set a precedent on which any Dominion would in future have the right to act. Thus Duncan Hall had argued that this precedent created a general rule, and he supported his contention by urging that the international status already accorded to them in the Peace Conference and in the League of Nations had in itself given them 'a constitutional right to separate diplomatic representation.'<sup>1</sup> Likewise Lewis had declared: 'It may safely be asserted that they [the Dominions] have secured a constitutional right to separate diplomatic representation.'<sup>2</sup>

<sup>1</sup> *British Commonwealth of Nations*, pp. 253-9.

<sup>2</sup> *B. Y. I. L.*, 1922-3, p. 36.

Fauchille also appears to reach the same conclusion,<sup>1</sup> which, indeed, would seem to be involved in his contention that the admission of the Dominions to the League amounts to their recognition as equals of 'sovereign states.'<sup>2</sup> It is also true that, acting on the precedent of the agreement made by the British Government with Canada in 1920, the Irish Free State, with the co-operation of the British Government, had done in 1924 what Canada had not yet done, and had set up a Free State legation in Washington; and that no responsible person either in Great Britain or in any Dominion had made any suggestion that this action was improper or wrong.

But in spite of these facts and opinions, the position with regard to the Dominion right of legation was by no means clear before the Report of 1926. The statement made by Mr. Bonar Law in the British House of Commons in 1920 concerning the agreement with Canada showed that the British Government intended that the diplomatic intercourse established between Canada and the United States of America should differ in various ways from the diplomatic intercourse of the United States with other Powers. The Canadian Minister was to be 'accredited by His Majesty to the President, on the advice of his Canadian Ministers'; he was to be 'at all times the ordinary channel of communication with the United States in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government.' But: 'In the absence of the British ambassador, the Canadian Minister will take charge of the whole Embassy, of the representation of Imperial as well as Canadian interests.' Moreover, Mr. Bonar Law further declared: 'This new arrangement will not denote any departure, either on the part of the

<sup>1</sup> *Vide Droit international public*, tome i., 3<sup>ème</sup> partie, p. 33.

<sup>2</sup> *Vide supra*, p. 127.

British Government or of the Canadian Government, from the principle of the diplomatic unity of the British Empire.' <sup>1</sup>

It could no doubt be argued that Mr. Bonar Law's words about 'the diplomatic unity of the British Empire' were of no practical importance, that they were a phrase designed to comfort the uneasy Imperialists of the British House of Commons. But his words about 'the whole Embassy' were not a phrase; on the contrary, the arrangement that the Canadian Minister might replace the British ambassador was a most important one. Keith argued from it in 1924 that the Canadian Minister 'would have spoken even on purely Canadian matters *not as the mere representative of Canada*, but as the representative of the Empire specially selected on grounds of knowledge to deal with a special branch of Imperial interests'; <sup>2</sup> and elsewhere Keith declared that the Canadian Minister, had he been appointed, could only have concluded a treaty with the United States 'with the assent of the Imperial Government, however exclusively it [the treaty] might interest Canada alone.' <sup>3</sup> Keith, perhaps, went too far, but it is plain that the arrangement of 1920 did not constitute a clear and unequivocal establishment of the Dominions' right to send, at their discretion, normal diplomatic missions to foreign capitals, nor was the Irish action of 1924 finally conclusive.

All doubts about the point, however, were swept away by Sub-section (e) of Section v. of the Report of 1926. In that Sub-section the Committee note, as a 'development of special interest' since 1923, the appointment of a 'minister plenipotentiary to represent the interests of the Irish Free State in Washington

<sup>1</sup> Vide *Hansard*, May 10, 1920. p. 46.

<sup>2</sup> *The Constitution, Administration, and Laws of the Empire* (1924),

<sup>3</sup> *J.C.L.*, November 1923, 3rd Ser., vol. v., part iv., p. 167.

. . . now about to be followed by the appointment of a diplomatic representative of Canada.' They then go on to use these words :

*'In cases other than those where Dominion Ministers were accredited to the heads of foreign states, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.'*<sup>1</sup>

The words in italics show that the Imperial Conference held that the Dominions should henceforward be recognised to have the right, so far as British constitutional law and practice were concerned, to establish their own separate diplomatic missions in any foreign capitals they chose. It is only where they do not establish such missions that it is said to be desirable that in political questions Dominion Governments should act, not through their own agents, but through the existing diplomatic missions of Great Britain. There is thus an unequivocal recognition in the Report of the right of the Dominions to send missions where they will, and it was in pursuance of this right that the Canadian Government announced their decision in 1928 to add to their legation in Washington other legations in Paris and Tokyo. Similarly, the Irish Free State Government have announced their intention of establishing a legation in Paris. Of these new legations only that of Canada in Paris has so far been set up.<sup>2</sup>

Moreover, these missions are to be normal diplomatic missions of the ordinary kind. They are to be accredited by the King, of course, since he is the head of the Dominion Governments ; but in accrediting them he will act on the exclusive advice of his Dominion

<sup>1</sup> Cmd. 2768 (1926), pp. 26-7. (My italics.) facts and documents concerning Dominion Legations, vide Toynbee,

<sup>2</sup> For a useful summary of the *op. cit.*, pp. 64-71.

Ministers.<sup>1</sup> Further, the arrangement of 1920, that a Dominion Minister might replace a British ambassador, has disappeared into the limbo of the past. This arrangement was never approved by Mr. Mackenzie King, the present Prime Minister of Canada;<sup>2</sup> he pertinently asked 'where the authority of recall would reside if the Minister appointed by one British country and representing all the others made a mistake,'<sup>3</sup> it is indeed plain that the double control of the Canadian Minister would have opened the way to possible friction between the British and Canadian Governments; the Australian Government equally objected to it;<sup>4</sup> it would have been, to say the least, difficult to work where there were two Dominion missions in a single capital as there are to-day in Washington; it would be wholly unworkable if there were more than two; and it has now been dropped.<sup>5</sup> Lest there should be any question of its revival, the Canadian Government in their Privy Council Minute deciding to establish the legation inserted a special paragraph pointing out that it was 'not in contemplation to adopt the provision of the agreement effected in 1920, that whereby the Canadian Minister was to be a member of the British Embassy and to have charge, in the absence of the ambassador, of the Embassy.'<sup>6</sup> This settled the question for good and all.

Keith, writing in 1927, still showed a certain disposition to hold that the right which the Dominions have

<sup>1</sup> Keith, however, says that the Report of 1926 has made no difference to the rule that 'no diplomatist can be accredited to any foreign Power save by the King acting by the advice of the Imperial Government.' *Responsible Government*, 1928 ed., vol. ii. p. 1233, cf. pp. 191-3, *infra*.

<sup>2</sup> For the reason, says Hall, that 'Mr. King was critical of the 1921 tendency toward . . . a unitary foreign policy. . . . He had the Chanak incident and the Lausanne

Treaty fresh in his mind.' *Vide* Lowell and Hall, 1927, p. 608.

<sup>3</sup> *Times*, June 13, 1928.

<sup>4</sup> Keith, *Responsible Government*, 1928 ed., vol. ii. p. 894.

<sup>5</sup> Cf. Keith, *J.C.L.*, February 1927, p. 87.

<sup>6</sup> For text of the correspondence between the British, Irish, Canadian, and U.S. Governments on the establishment of the Dominion legations, see Lowell and Hall, *op. cit.*, pp. 652-6.

acquired differs from the normal right of legation. Thus he said :

‘The Conference, it is clear, did not in the slightest desire that foreign states should reciprocate by accrediting Ministers to Ottawa, Dublin, or Canberra.’<sup>1</sup>

In 1928 he wrote again :

‘Nothing whatever was agreed to secure diplomatic representation of any foreign country, save the United States, in the Dominions.’<sup>2</sup>

To this point it is sufficient answer to recall that later in 1927 the United States accredited Ministers both to Ottawa and Dublin, and that in 1928 the French Government accredited a Minister to Ottawa.

Nor does the procedure adopted by the United States Government and the diplomatic corps in Washington with regard to the Dominion missions in any way support Keith’s view. On the contrary, the normal procedure of diplomatic intercourse has been applied in every way. The Canadian and Irish Ministers have both been accorded full recognition by the diplomatic corps at Washington, and occupy their own separate places in the order of precedence.<sup>3</sup> It may be added as a point of particular interest that when United States Ministers were appointed to Ottawa and Dublin, they presented their credentials direct to the Governors-General of Canada and the Irish Free State, in their capacity as representatives of the King.<sup>4</sup> There would thus appear to be nothing to distinguish the diplomatic intercourse of the Dominions in its form from that of ordinary sovereign states.

Keith is on sounder ground in thinking that there is not likely to be a rapid increase in the number of

<sup>1</sup> *J.C.L.*, February 1927, p. 88.

<sup>2</sup> *Representative Government*, 1928 ed., ii. p. 1234.

<sup>3</sup> Lowell and Hall (1927), p. 605.

<sup>4</sup> *Irish Parliamentary Debates*, February 22, p. 736, Department of State Press Release, June 1, 1927. Cited by Hall, *ibid.*

Dominion missions in the early future. Such missions will be created only when they are practically required, and while so few of the 'citizens' of the Dominions live abroad the need will clearly not be great. But when the Dominion Governments think the need exists, they will have the right, so far as British constitutional law is concerned, to establish whatever missions they desire to have. This view was stated without hesitation by an Australian Government agent in a speech in the United States in 1926.<sup>1</sup> It was stated again on December 16, 1926, by the Irish Minister of External Affairs, who said :

'Our relations with foreign countries will *for some time* be largely carried on through the British Foreign Office and its representatives abroad acting as mandatories.'<sup>2</sup>

The argument put forward above in its favour may be supported by the following quotation from one of the highest living authorities, if not the highest living authority, on the point. Sir Cecil Hurst of the British Foreign Office, in his Chicago lectures to which reference has been made, said this :

'*Every Dominion is entitled, if it so desires, to nominate its own diplomatic representatives at any foreign capital to take charge of its interests and the interests of its citizens in that country.*'<sup>3</sup>

It may also, perhaps, be relevant to note why the Dominion Governments attach importance to the right of legation. In defending the establishment of the new legations in Paris and Tokyo in the Canadian House of Commons, Mr. Mackenzie King spoke of the practical value of personal contacts in diplomacy, and then he said : 'The action taken was a natural and

<sup>1</sup> *Vide* Toynbee, *op. cit.*, p. 71.

<sup>2</sup> Cited by Lowell and Hall, 1927, p. 690. (*My italics.*)

<sup>3</sup> *Op. cit.*, pp. 50-1. (*My italics.*)

For a further discussion of the practical problems of diplomatic missions abroad, *vide infra*, Chap. VII, pp. 250-7.

necessary development of self-government.’<sup>1</sup> This proves that in building up their diplomatic intercourse with foreign countries the Canadian Government specifically desire to do so through ‘representatives of Canada,’ rather than through ‘representatives of the Empire specially selected on grounds of knowledge to deal with a special branch of Imperial interests.’

#### RIGHTS WITH REGARD TO CONSULAR SERVICES.

Up to the end of 1927, the Dominions had created no consular services of their own. There were negotiations in the latter part of 1927 between Ottawa and Washington for the establishment of Canadian consuls in the United States, but no result has yet been reached.<sup>2</sup> On December 16, 1926, the Irish Minister for External Affairs announced that :

‘Consuls will gradually be appointed to foreign countries as the need arises, and through them, as well as through the Consuls-General here, most of our routine [diplomatic] business can be carried on.’<sup>3</sup>

So far as the present writer is aware, however, no Free State consulates abroad have yet been set up, although the right to set them up was thus categorically asserted.

There are, indeed, a number of Dominion trade commissioners and agents in various foreign countries, who fulfil for their Governments some of the functions of consuls, but they have not yet received the status or privileges of consuls proper. Where Dominion ‘citizens’ have required the help or the legal services of consuls, they have had to seek it from the consuls whom the British Government maintains.

<sup>1</sup> *Times*, June 13, 1928. Toynbee, *op. cit.*, p. 65, calls the establishment of the Canadian Legation in Washington ‘simply the corollary, in the diplomatic sphere, of the accomplished fact of Canada’s attainment of full nationhood.’

<sup>2</sup> Vide *Bulletin of International News* published by the Association for International Understanding, September 17, 1927, p. 18.

<sup>3</sup> Cited by Lowell and Hall, 1927, p. 690.

Similarly, in respect of foreign consuls established on Dominion soil, the formalities concerned with the reception of such consuls were performed up to 1926, not by the Dominion Governments but by the British Foreign Office in Downing Street. It was the Foreign Office that issued the exequatur required. When a foreign Power desired to appoint as consul in a Dominion some local resident, the Government of that Dominion were asked whether they had any objection to the acceptance of the chosen candidate. Where, on the other hand, the foreign Power desired to appoint not a local resident but a consul *de carrière*, the Dominion Government were not consulted in any way, on the ground that since they had no diplomatic missions they could know nothing either in favour of or against the candidate proposed. The Foreign Office, therefore, issued the exequatur at its own discretion, and on its own responsibility alone.

In this system the Report of 1926 has made two changes of importance. They are both contained in Sub-section (d) of Section v., entitled 'Issue of Exequaturs to Foreign Consuls in the Dominions.'

First, the distinction of procedure with regard to local residents and consuls *de carrière* has been abolished, and 'in future any application by a foreign Government for the issue of an exequatur to *any person*' (my italics) who is to act as consul in a Dominion must 'be referred to the Dominion Government for consideration.'

Second, if the Dominion Government agrees to the issue of an exequatur, it will not be issued out of hand by the Foreign Office, as heretofore, but will 'be sent to them for counter-signature by a Dominion Minister.' Without such counter-signature—without, that is to say, both definite decision and definite action by a Dominion Government—no exequatur in future will

be valid in respect of a Dominion, and without it, therefore, no foreign consul can take up his duties on Dominion soil.

These changes are evidently one more recognition of the equality of status of the Dominions. And they are more than a matter of form. They reduce the functions of the British Government in respect of the reception of foreign consuls in the Dominions to the merest formality, since it is the will of the Dominion Government alone that counts. Thus they transfer to the Dominions definite and specific rights and duties in connection with one of the important agencies by which the international intercourse of states is carried on.<sup>1</sup>

#### REPRESENTATION AT INTERNATIONAL CONFERENCES.

Sub-section (b) of Section v. bears the title 'Representation at International Conferences.'<sup>2</sup> It contains a full and systematic statement of existing practice with regard to the representation of the Dominions at conferences of different kinds, and lays down a number of agreed principles of action with regard thereto. It says that the whole question has been studied 'in the light of the [Treaty] Resolution of the Imperial Conference of 1923'; but since, in fact, it contains little matter that is new, it may be dealt with briefly.

The Balfour Committee of 1926 distinguish two main classes of international conferences—those convened by, or under the auspices of, the League of Nations, and those convened by foreign Governments.

With regard to the first class, they say that 'no difficulty arises,' since all Members of the League are invited to attend, and are represented, if they do attend,

<sup>1</sup> Cf. Keith, *J.C.L.*, Feb. 1927, p. 90; *Responsible Government*, 1928 ed., p. 914. Again he appears to the present writer to understate the importance of the change that was made by the

Report, on the ground that 'consuls are not diplomatic officials, and the signing of the exequatur has no great international significance.'

<sup>2</sup> Cmd. 2768 (1926), pp. 24-5.

by separate delegations. 'Co-operation,' they add, 'is assured by the application of paragraph I., i: (c) of the Treaty Resolution of 1923'<sup>1</sup> (*i.e.* adequate prior consultation on all occasions, including international conferences where the Dominions have separate delegations).

With regard to the second class, 'no rule of universal application,' they say, 'can be laid down,' since much must depend on the form of invitation issued by the convening Government.

If the conference is 'of a technical character,' it is always desirable that the Dominions should be represented by separate delegations, and 'where necessary, efforts should be made to secure invitations which will render such representation possible.'

If the conference is 'of a political character,' each case must be considered on its merits. There are three possible methods of procedure by which the Members of the British Commonwealth may, if they desire, be represented:

First, 'by means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.'<sup>2</sup> It should be particularly noted that in this case there may be only one single full power, but that it cannot give authority to represent any Dominion without the consent, and indeed without the active constitutional action by means of Order in Council (for that is what 'advice' now means), of the Government of that Dominion.

Second, 'by a single British delegation composed of separate representatives of such parts of the Empire as are participating in the conference.'<sup>3</sup> This was the system sometimes adopted for securing representation in the Council of Twenty-Five, in the Council of Ten, and occasionally even in the Council of Five, at the

<sup>1</sup> Cf. *infra*, p. 166, §§ 7 and 8.

<sup>2</sup> Cmd. 2768 (1925), p. 25.    <sup>3</sup> *Ibid.*

Peace Conference of Paris in 1919; it was likewise the system adopted for the Washington Disarmament Conference of 1921, where there were five delegates who held six separate full powers, who represented among them all the Members of the Commonwealth and India as well, but who formed none the less a single 'British Empire' delegation.

Third, 'by separate delegations representing each part of the Empire participating in the conference,'<sup>1</sup> i.e. the method adopted for the representation of the Dominions in conferences convened by the League of Nations.

For the purpose of assisting the Governments of the Commonwealth in their choice between these three methods of procedure, the Report lays down three guiding rules of action:

1. 'It is for each part of the Empire to decide whether its particular interests are so involved . . . that it desires to be represented at the Conference.'<sup>2</sup>

2. 'If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.'<sup>2</sup>

3. 'If, as a result of this consultation, the third [separate delegation] method is desired, an effort must be made' (presumably by the British Government and/or by all the Governments together, through whatever diplomatic missions they may have) 'to ensure that the form of invitation from the convening Government will make this method of representation possible.'<sup>2</sup>

Now, in the light of these rules of action, it is plain that either of the first two methods of representation can be secured in any conference at the discretion of the Governments of the British Commonwealth, whether the convening Government invites each Dominion separ-

<sup>1</sup> Cmd. 2768 (1926), p. 25.

<sup>2</sup> *Ibid.*

ately, or whether it addresses a single invitation to the British Government for the Empire as a whole. In other words, if the Dominions prefer either of these first two methods, a single plenipotentiary for all or a single composite delegation, they have only to say so, and they can *always* have it, whatever the form of invitation that is received.

It must be added, however, that they are not very likely to choose either of these two methods of their own free will. It is true that all the Dominion Governments agreed that the Liquor Convention between the British Empire and the United States signed on January 23, 1924, should be negotiated and signed by the British Ambassador in Washington alone, and that they further agreed that his signature should bind the Dominions so far as their interests were concerned.<sup>1</sup> On that occasion, however, they had all discussed the matter in the Imperial Conference of 1923, and had agreed on the policy to be pursued. There was no such concurrence—indeed, on the contrary, as is well known,<sup>2</sup> there was considerable friction—when Lord Curzon, without consulting the Dominions, agreed with France that this first method should be adopted at the Conference of Lausanne in 1922, and that the Empire should be represented only by two British delegates, and when he proceeded to sign the Lausanne Treaty in virtue of an ‘unlimited full power,’ that is to say, of a full power made out in the name of the British Empire as a whole. It may, indeed, be confidently said that the course pursued on that occasion by Lord Curzon would now, as a result of the Report of 1926, be definitely unconstitutional, since Lord Curzon could have no right to act in the name of the Empire as a whole, unless the

<sup>1</sup> Dafoe calls this a ‘Treaty negotiated with the United States on behalf of the whole Empire by the British Foreign Office.’ *Great Britain*

*and the Dominions* (Harris Foundation Lectures, 1927), p. 215.

<sup>2</sup> Cf. pp. 173 and 184-5, *infra*.

Dominions had first definitely 'advised' the King to authorise him to do so.<sup>1</sup> It may also be said that this first method is most unlikely to be adopted in the future, except perhaps in matters of minor political importance, on which the Governments of the Commonwealth have previously agreed.

Equally the second method of procedure, that of a single 'mixed delegation,' is unlikely to be freely chosen by the Dominion Governments. It was in fact agreed to by the Dominions at the Washington Conference of 1921, but only after protest by the Government of General Smuts.<sup>2</sup> The method is naturally unpopular, for a single delegation must speak with a single voice, and it is too much for the Dominions to expect that in important matters they will always be in every particular agreed. It is, indeed, just because they may not be agreed that they desire the right to make their voice heard in international conferences. But if they are not agreed, then in a single 'mixed' delegation some of them will be obliged to subordinate their views to those of others, a prospect with which they are not very likely to be content.<sup>3</sup>

There remains, therefore, the third or 'separate' delegation method, which in all important political matters the Dominions will almost certainly desire. Whether they can obtain it or not, however, will not depend entirely on themselves. It will depend also on the form of invitation which the convening Government sends. And it is possible that the convening Government, observing that the Governments of the

<sup>1</sup> Cf. Toynbee, *op. cit.*, pp. 86 *et seq.*, where it appears that Lord Curzon's action was due to pressure by the Government of France. Also *ibid.*, pp. 92-5, concerning the incidents connected with the London Reparations Conference of 1924.

<sup>2</sup> For Sir R. Borden's account of this episode, vide *J.R.I.I.A.*, July

1927, pp. 202-3. Lord Balfour represented both Great Britain and South Africa, but with two separate full powers; vide p. 173 n., *infra*.

<sup>3</sup> Cf. Hurst, *op. cit.*, pp. 84-93, for a valuable discussion of these points, and in particular for an explanation of these difficulties of the second method of representation.

Commonwealth are still bound by constitutional links under a single sovereign, will insist that, while this is so, they are only entitled to a single delegation in the conference proposed. This actually happened in connection with the Washington Conference of 1921, when the United States failed to issue separate invitations to the Dominions.

But it must be noted that under the Report even in such a case 'an effort must be made' to change the attitude of the convening Government, and 'to ensure that the form of invitation . . . will make this method of representation possible.' In other words, so far as British constitutional law is concerned, the Dominions henceforward have the right, if after 'consultation' they desire to do so, to ask for separate delegations at *any* political international conference of whatever kind, and the British Government is bound to help them, if it can, to get their way. This right is absolute, and subject to no restrictions of any kind.

It is still too soon to say that this Dominion right of separate delegation at all diplomatic conferences of every kind has also received general international recognition and is therefore valid in International Law. Until it does receive such recognition, it may still happen that the convening Government will repulse the 'efforts' to secure separate invitations which the British or Dominion Governments may make. But in fact it is every year increasingly unlikely that any foreign Government would do so. Sir Robert Borden has expressed the opinion that the United States Government refused to invite the Dominions to the Washington Conference in 1921 because 'it was not a Member of the League of Nations, and probably for that reason did not feel justified in recognising the place which the Dominions had secured in the Family of Nations.'<sup>1</sup> Keith, com-

<sup>1</sup> *Loc. cit.*, pp. 202-3.

menting in 1924 on this episode, said that the United States Government 'would clearly not have accepted any derogation from either principle,' *i.e.* from the principles of 'the Imperial appointment of the Dominion delegates' and 'the necessity of the Empire acting as a whole.'<sup>1</sup> The United States is still not a Member of the League, yet it has completely changed its attitude and policy in this regard. In 1927 it summoned in Geneva another Naval Conference, a conference identical in purpose with that of 1921. To this conference the United States Government issued separate invitations to the Dominions, who all sent their own separate Dominion delegations, whether or not they themselves possessed any naval forces of any kind. Again in 1928 (at the suggestion of the British Government) the United States Government invited the Dominions to send their own separate delegates to the meeting in Paris at which the Kellogg Treaty for the Renunciation of War was signed, and once more they did so, the Canadian Prime Minister himself crossing the Atlantic to attend.

The supreme political importance of the matters with which these two conferences dealt lends additional significance to these precedents. They appear the more important also if Sir R. Borden's explanation of the attitude of the United States in 1921 is borne in mind, because they were established by a Government which is not a Member of the League. It is fair to say that they would very probably—indeed, almost certainly—be followed in the future both by the United States Government itself<sup>2</sup> and by the Governments of all the Members of the League, who are so used to separate Dominion delegations in Geneva that it is now almost impossible—whatever may have been true at Lausanne in 1922—that they should object to their reception.

<sup>1</sup> *Constitution, Administration, and Laws*, p. 47.      <sup>2</sup> *Of. supra*, p. 129.

It may therefore be concluded that the right of the Dominions to send separate delegations, if they desire to do so, to any international conference of whatever kind, whether 'technical' or political, whether convened by, or under the auspices of, the League of Nations or by a foreign Government, is now virtually established.

With regard to 'League' conferences, the right has received universal recognition, as was explained in the last chapter,<sup>1</sup> and there is, therefore, no shadow of doubt that it exists. With regard to non-League conferences, the right is, of course, much less clearly established in international practice, but the Report of 1926 and the precedents of 1927 and 1928 above described have taken matters so far that there is, in fact, little practical chance that any demand which the Dominions may make will ever be refused.<sup>2</sup>

The rapid evolution of Dominion rights with regard to representation in international conferences has been due primarily, of course, to a logical application of the principle of equality of status, but there is no doubt that it has also been due in part to the position of the Dominions in the League. It is, therefore, relevant to remark that in all probability the League will in future convene an ever-growing proportion of the international conferences, technical or political, that are held, and that therefore the rights of the Dominions with regard to representation at such conferences will grow continually stronger, while such chance as still remains that their claim to send separate delegations will ever be denied will grow continually less until it finally disappears.

<sup>1</sup> Cf. *supra*, p. 91.

<sup>2</sup> This conclusion differs from that of Toynbee, *vide op. cit.*, pp. 95-8. His political explanation of the variation of practice between 1919 and 1927 is of great interest,

but it appears to the present writer that he does not allow sufficient weight to the two precedents which followed the Report of 1926 and which are discussed above.

PROCEDURE IN RELATION TO TREATIES : NEGOTIATION,  
FORM OF TREATY, FULL POWERS, SIGNATURE,  
COMING INTO FORCE OF MULTILATERAL TREATIES.

We now come to the longest and most difficult part of Section v. of the Report, that which is entitled 'Procedure in relation to Treaties.'

In the discussion which follows, the purpose which has been kept in view throughout has been that of determining whether or not the Dominions have now acquired the 'treaty-power'; whether they must now be regarded as constitutionally entitled to negotiate, sign, and ratify treaties on their own behalf, and without the assistance, intervention, or permission of the British Government. Before the Imperial Conference of 1926 there was the same conflict of opinion on this point as on the general question of the status of the Dominions in the general sphere of International Law. An account of this conflict has been given above in so far as it related to Dominion participation in the Treaty of Versailles.<sup>1</sup> The doctrine put forward by Keith, that the Dominion signatures to that treaty were 'internationally indifferent,' was there discussed and rejected. But even the acceptance of the view that the Dominions were parties in their own name to the Treaty of Versailles would not necessarily involve the conclusion that they had also acquired a general right to conclude international treaties for themselves.

In fact, however, the precedent of the Treaty of Versailles was followed by other practice, including the so-called Halibut Treaty of 1923, and then by the Treaty Resolution of the Imperial Conference of 1923 to which reference has been made. These events led some authorities to the conclusion that by 1923 the treaty-power had been definitely acquired. Thus Sir

<sup>1</sup> Cf. *supra*, pp. 63 *et seqq.*

Cecil Hurst, writing of the Halibut Treaty, said that 'the stage had been reached that a Dominion was at liberty to negotiate and conclude a treaty on a matter exclusively affecting its own interests.'<sup>1</sup> Keith, on the other hand, vigorously denied that such a change had taken place. Writing likewise of the Halibut Treaty, he said that the Canadian representative could only make it 'with the assent of the Imperial Government.' He argued elsewhere that ratification of any treaty, even if it exclusively affected a Dominion, was 'essentially an act of the Crown *on the advice of the Imperial Government*';<sup>2</sup> and asking the question 'whether it would not be better frankly to admit that the Dominions have the treaty-power,' he answered it with an emphatic negative.<sup>3</sup>

What light is thrown on the merits of this controversy by the Report of 1926? This question must be answered by an examination of the terms of Sub-section (a) of Section v. of the Report. It will be convenient to examine Sub-section (a) together with the terms of the Treaty Resolution of 1923, on which Sub-section (a) is based, and to start by as clear a statement as possible of the rules which the two documents, when they are analysed together, seem to lay down.<sup>4</sup> The headings and arrangement of the Report are followed here.

*Negotiation.*—The rules put together under the heading of 'Negotiation' are as follows:

1. 'It is desirable that no treaty should be negotiated by any of the Governments of the Empire without the consideration of its effects on other parts of the Empire. . . .' (i. i. (a), 1923.)

<sup>1</sup> *Op. cit.*, p. 81. Cf. also Lewis, who takes roughly the same view, *B.Y.I.L.*, 1925, pp. 33-4.

<sup>2</sup> *Constitution, Administration, and*

*Laws of the Empire*, 1924, p. 57.

<sup>3</sup> *J.C.L.*, November 1923, p. 168.

<sup>4</sup> *Vide* the two documents in Appendix II., pp. 392-6, *infra*.

2. Therefore, in order that the Governments of other parts of the Empire may judge for themselves of the probable effects of a treaty, any Government intending to negotiate a treaty should so inform all the other Governments of the Commonwealth *before negotiations are begun*. This should be done in *every* case of proposed negotiation for a treaty. (I. i. (b), 1923; paras. 1 and 2 of 1st sub-sub-section of Sub-section (a) of the Report.)

3. When a Government has received information of the intention of any other Government to negotiate a treaty, it has 'the opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.' (I. i. (b), 1923.)

4. When a Government has received such information, 'it is incumbent upon it to indicate its attitude with reasonable promptitude.' (Para. 3 of 1st sub-sub-section, 1926.)

5. 'So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable.' (Para. 3 of 1st sub-sub-section, 1926.)

6. But before the initiating Government takes 'any steps which might involve the other Governments in any obligations,' it must obtain 'their definite assent.' (Para. 3 of 1st sub-sub-section, 1926.)

7. If, in accordance with Rule 3 above, more than one Government decides to participate in the negotiations, 'there should be the fullest possible exchange of views between those Governments before and during the negotiations.' (I. i. (c), 1923.)

8. Rule 7 is to apply to all international conferences at which the Dominions have separate delegations. (I. i. (c), 1923.)

9. If, when negotiations have been begun, points arise likely to be of interest to any Government of the Commonwealth which is not taking part in the negotiations, 'steps should be taken to ensure that those

Governments . . . be kept informed' of such points. (i. i. (d), 1923.)

10. 'Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire,<sup>1</sup> the initiating Government may assume that a Government which (under Rule 3 above) has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification.' (Para. 4 of 1st sub-sub-section, 1926.)

11. If a Government objects to 'concurring in the ratification' of a treaty which has not been signed by its own plenipotentiary authorised to act on its behalf,<sup>2</sup> 'it will advise the appointment of a plenipotentiary so to act.' (Para. 4 of 1st sub-sub-section, 1926.)

It will be observed that these rules have two purposes.

The first purpose is to ensure that every Government in the Commonwealth shall have full opportunity to decide for itself whether it is interested in any negotiations that may be proposed by any other Government, and to participate in these negotiations either directly or indirectly, if it deems that its interests are in any way involved. The rules make it certain that in every way and at every stage each Government shall be able to make this decision for itself, and shall not be dependent for its opportunity to take part on the judgment of some other Government as to whether it is interested or not. The point is important, because, as Sir Cecil Hurst has said, 'No Government can tell whether the interests of another Government will be affected. What is more important still, no Government likes to have a question of that sort decided over its head.'<sup>3</sup>

The second purpose of these rules is to ensure that a Government which has done its duty in informing the other Governments of what it is doing, and has not

<sup>1</sup> For a discussion of the meaning of this phrase, see *infra*, pp. 263 *et seqq.*

<sup>2</sup> As the Canadian Government

objected to concurring in the ratification of the Treaty of Lausanne.

<sup>3</sup> *Op. cit.*, p. 76.

received 'adverse comment' on its policy, shall not be hampered when the negotiations are nearing their conclusion by eleventh-hour objections from Governments who have not availed themselves of their opportunity to take part. Such objections would put the negotiating Government in an impossible position, and they would equally embarrass and annoy the foreign Government with which the treaty was being made. The safeguards on this subject are contained in Rules 4, 5, 10, and 11, and they are designed to protect a negotiating Government from unpleasant surprises, either while the treaty is being made, or after it has been signed and before ratification takes place.

It is plain that the achievement of these two purposes is essential if the present machinery of the British Commonwealth is to work without friction. The rules set out above are, indeed, if different Governments in the Commonwealth are to be free to make treaties for themselves, the necessary condition upon which alone the system of 'co-operation' between them can be made to work. These rules, moreover, are not only important in connection with the negotiation of treaties: they are the logical working out of the duty of 'consultation,' which results from the new 'Constitutional Convention' above discussed, and they are therefore in principle, if not in detail, applicable to all departments of public affairs in which the Governments of the Commonwealth may desire to take international action. Since this new conventional duty of 'consultation' is of paramount importance to the whole international position of the Dominions, and especially to their rights in respect of treaties, it is suitable that this statement of it should come first in the consideration of the subject of the treaty-power.

*Form of Treaty.*—The rules under this heading are all contained in the second sub-sub-section of Sub-section

(a) of Section v. of the Report of 1926.<sup>1</sup> The references below are to the paragraphs of that sub-sub-section. The rules are as follows :

1. 'It is recommended that all treaties (other than agreements between Governments), whether negotiated under the auspices of the League or not, should be made in the name of Heads of States.' (Para. 2.)<sup>2</sup>

2. 'If the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire.' (Para. 2.)

3. 'The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India.' (Para. 2. It may be noted that this is the order of seniority of the Dominions as self-governing units.)<sup>3</sup>

4. 'In the case of a treaty applying only to one part of the Empire, it should be stated to be made by the King on behalf of that part.' (Para. 3.)

5. If a treaty is made in the name of the King, its provisions will automatically *not* apply as between 'the various territories on behalf of which it has been signed in the name of the King.' (Para. 4.)

6. If the Governments of different parts of the Empire desire to apply an international agreement among themselves, they can of course do so 'as an administrative measure.' But in that case, 'the form of a treaty between Heads of States should be avoided,' and the treaty should be made in the name of the contracting countries or territories. (Para. 5.)

Rules 5 and 6 above concerning the application of

<sup>1</sup> Cmd. 2768 (1926), pp. 22-3; *vide infra*, pp. 346 *et seqq.*

<sup>2</sup> Cf. *infra*, pp. 181-2 and 290 *et seqq.*

<sup>3</sup> Cf. specimen form of treaty attached to the Report and reproduced in Appendix II., pp. 401-2; *infra*.

general or group international treaties as between the Members of the British Commonwealth *inter se* raise some difficult points, the consideration of which may conveniently be postponed to Chapter VII., since they do not touch the main question of the treaty-power now being discussed.

The significance of the first four rules lies in the explanation given in the Report of the change in practice which they involve. Before the Imperial Conference of 1926, 'adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party' led to the practice of using in the preamble of treaties the word 'British Empire,' 'with an enumeration of the Dominions and India, if parties to the convention.'<sup>1</sup> This was the form of the Treaty of Versailles and of a number of treaties made under the auspices of the League of Nations. It will be noted that it means that there is no mention of Great Britain as a contracting party; while it leaves the position of the Dominions open to doubt, as is shown by Keith's arguments discussed above.

As mentioned in the last chapter, Sir Robert Borden had protested against the adoption of this form in the Treaty of Versailles, but he had been overborne.<sup>2</sup> In 1926, however, the Committee of the Imperial Conference recommended its abolition and the substitution of Rules 1 to 4 above, on the ground that the older form, '*while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.*'<sup>3</sup>

This is a categorical assertion in the plainest language that the Dominions are to be considered as on a footing of equality with Great Britain as parties to the treaties which they sign. It is because their purpose is to make

<sup>1</sup> Cmd. 2768 (1926), p. 22.    <sup>2</sup> *Vide supra*, pp. 71 *et seqq.*    <sup>3</sup> My italics.

this plain that the new rules above are important. The King is to be the contracting party in respect both of Great Britain and of the Dominions, but he is to contract with foreign Powers not for one single unit, not for one single Government, but for as many units, for as many Governments as sign the treaty. The Dominions, therefore are to be 'parties' to the treaties which their delegates sign on the King's behalf just as truly as Great Britain is a party to the treaties which the British Government's delegates sign. That fact is plainly held to be in no way altered or affected, so far as foreign parties are concerned, by the fact of the 'special relationship' which still subsists among the British parties, and of which their common use of the King's name is the symbol; nor is it held to be affected by the group arrangement of the British parties in the preamble to a treaty, or in the signatures thereto.

The point is made still more explicit by Rule 4, under which, if a Dominion desires to make a treaty for itself alone, the preamble is to state that the King contracts for that Dominion only. This is right and necessary, because it is that Dominion and that Dominion alone which is the party for whom the King must act. Rule 4 itself is simply a clearer statement of a rule set forth in 1. ii. (a) of the Resolution of 1923, where it is laid down that in 'bilateral treaties imposing obligations on one part of the Empire only . . . the preamble and text of the treaty should be so worded as to make its scope clear.'

The significance of the above rules about the form of treaties is much increased if they are read in the light of the succeeding paragraphs of the Report, and particularly if they are read in the light of the rules concerning 'full powers' and 'signature.' These rules serve to make it doubly certain that the purpose of the changes made in the form of treaties is to clarify and

establish the position of the Dominions as parties equal with Great Britain to the treaties which they sign.

*Full Powers.*—The rules concerning full powers are these:

1. If a bilateral treaty imposing obligations on one part only of the Empire is to be made, the full power issued to its representative 'should indicate the part of the Empire in respect of which the obligations are to be undertaken.' (I. ii. (a), 1923.)

2. For the making of a general group, or bilateral treaty, 'the plenipotentiaries for the various British units should have full powers, *issued in each case by the King on the advice of the Government concerned*,<sup>1</sup> indicating and corresponding to the part of the Empire for which they are to sign.' (3rd sub-sub-section of Sub-section (a) of Section v., 1926.)

3. A Government may advise the issue of full powers on its behalf 'to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned,' if it desires to do so. This 'will frequently be found convenient,' particularly where the proposed treaty may not involve active obligations on the said Government, but may affect the position of British subjects who are its 'citizens.' [Sir Cecil Hurst gives us an example the case of a British-Siamese treaty concerning capitulations, which may impose no 'active obligations' on, say, New Zealand, but which will affect the rights and position of British subjects from New Zealand in Siam.]<sup>2</sup> (*Ibid.*)

4. 'In other cases provision might be made for accession by other parts of the Empire at a later date.' (*Ibid.*)

Of the above rules, Rule 1 is obviously a recognition of the rights of the Dominions to negotiate treaties for themselves, and treaties applicable to their own territory alone.

<sup>1</sup> The italics are mine.

<sup>2</sup> *Op. cit.*, pp. 79-80.

Rule 3 is merely permissive, the suggestion of a procedure that will be cheap and effective, and obviously proper as between Governments which are in the 'special relationship' existing between the Members of the British Commonwealth. Its significance lies in the fact that it stipulates that even when a single plenipotentiary negotiates for more than one British Government, he must have a Full Power from each.<sup>1</sup> Sir Cecil Hurst has explained that this does not necessarily mean that there must be a separate document containing a separate full power from each Government, but merely that no 'unlimited full power' must be issued, no full power, that is to say, which would authorise the bearer to sign generally for the Empire as a whole.<sup>2</sup> Thus if a single document is given to a common plenipotentiary, it must clearly state that it authorises the plenipotentiary to sign for Great Britain, for Canada, or for any other of the Members of the Commonwealth who desire to be parties to the treaty.

This arrangement is a necessary consequence of the far more important Rule 2, which lays down the principle that any full power issued by the King in respect of a Dominion *must be issued on the advice of the Government of that Dominion*. It must be noted that this principle is absolute and without exception. It means, to quote Sir Cecil Hurst again, that '*no Government has authority to advise the King to issue a full power in respect of the territory subject to another Government*' of the Commonwealth.<sup>3</sup>

<sup>1</sup> Thus at Washington in 1921 Lord Balfour acted both for Great Britain and for South Africa. 'He had received full powers as plenipotentiary for the United Kingdom,' says Sir R. Borden, 'which might legally have justified him in signing also for South Africa. But constitutionally this was insufficient, and accordingly separate and distinctive "full powers" were issued to Lord

Balfour as plenipotentiary for South Africa.' *J.R.I.I.A.*, July 1927, pp. 202-3.

<sup>2</sup> *Op cit.*, pp. 82-3. Thus, as said above, Lord Curzon's proceedings at Lausanne would now be plainly unconstitutional. *Vide supra*, pp. 159-60; *infra*, pp. 184-5.

<sup>3</sup> *Ibid.*, pp. 83-4. (The italics are mine.)

Thus, final sanction and confirmation have been given in British constitutional practice to the procedure which Sir Robert Borden first adopted in 1918 when he drew up his Order in Council 'advising the King' to issue full powers to the Canadian delegates to the Peace Conference; and the Dominion Governments will have henceforward the indisputable right and duty to 'advise' the issue of their own full powers to all those who act on their behalf in international negotiations, whatever the subject and the occasion of the negotiations may happen to be.

*Signature.*—The rules concerning the signature of treaties are these :—

1. 'Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part.' (I. ii. (a), 1923.)

2. 'Where a bilateral treaty imposes obligations on more than one part of the Empire, the Treaty *should be signed* by one or more plenipotentiaries *on behalf of all the Governments concerned.*'<sup>1</sup> (I. ii. (b), 1923.)

3. 'As regards treaties negotiated at International Conferences' (i.e. general treaties or conventions), 'the existing practice of *signature by plenipotentiaries on behalf of all the Governments of the Empire represented at the Conference* should be continued.'<sup>1</sup> (I. ii. (c), 1923.)

4. 'The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above' (*vide* rules concerning Form of Treaty above). (Para. 1 of 4th sub-sub-section of Sub-section (a) of Section v. of Report, 1926.)

Rule 1 above settled the controversy which had arisen concerning the signature of the Halibut Treaty between Canada and the United States in 1923. That, it may be recalled, was the first occasion on which a Dominion treaty had been signed by a representative of

<sup>1</sup> The italics are mine.

a Dominion alone without the accompanying signature of a British diplomat.<sup>1</sup> This rule, adopted by the Imperial Conference of 1923—that is to say, a few months after the incident of the Halibut Treaty—definitely confirmed the precedent then set, and determined that for the future treaties to which Dominions are parties shall be signed in respect of such Dominions by their own representatives *alone*; British representatives only signing if Great Britain is also a party, and then in respect of Great Britain only.<sup>2</sup>

Apart from this further recognition of Dominion rights, the other points of importance in these rules are three :

First, that if any Dominion is to be bound in any way by a treaty, there must be a definite signature appended to that treaty specifically on its behalf.

Second, that one signature cannot cover more than one Member of the British Commonwealth; there must not only be a signature, but a *separate* signature on behalf of each Dominion that is to be bound by the treaty to be made. Unless there is such a separate signature on its behalf, a Dominion is not bound.<sup>3</sup>

Third, that the so-called 'exclusion clause,' providing that treaties by the British Government do not apply to the Dominions unless they specifically adhere to them

<sup>1</sup> Cf. *supra*, pp. 58 and 164-5. For a valuable account of the facts of the Halibut Treaty incident, *vide* Toynbee, *op. cit.*, pp. 101-4; and for a most illuminating discussion of those facts *vide* Sir W. Harrison Moore, *J.C.L.*, February 1926, pp. 20-37.

<sup>2</sup> Cf. declaration by M. Lapointe, Deputy Prime Minister of Canada and delegate to the 'Coolidge' Naval Conference of 1927, in a speech made in Paris on the eve of that Conference: 'A la Conférence de Genève de désarmement naval, les pouvoirs des délégués de la Grande Bretagne sont limités à leur territoire et aux

colonies, et je suis le seul qui aie le droit et l'autorité de parler au nom du Canada, et dont la signature puisse l'obliger.' At the Cercle Interallié, Paris, July 1, 1927.

<sup>3</sup> Cf. M. Lapointe, Canadian Minister of Justice, on March 30, 1927: 'Hereafter Treaties will be made and signed, not by and for the British Empire, but by and for Great Britain and such other portions of the Empire as may be concerned in those Treaties . . . on behalf of Great Britain and whatever other section of the Empire may be a participant in and a signatory to the negotiations'; cited by Lowell and Hall, 1927, p. 681.

(as e.g. in Commercial Treaties and in the Locarno Treaty of Mutual Guarantee) is no longer required, for the reason that a Dominion henceforward 'will be involved in any Treaty only if it is a party thereto.'<sup>1</sup>

These rules confirm what has been the predominating though not the universal practice since 1918.<sup>2</sup> It may be added that since 1923 Canada has made at least six other treaties by the same procedure adopted for the Halibut Treaty, including treaties with the United States of America, Belgium, and Holland.<sup>3</sup>

*Ratification and Coming into Force of Multilateral Treaties.*—The rules concerning the ratification of treaties are these:

1. 'The ratification of treaties imposing obligations on one part of the Empire is effected *at the instance of the Government of that part.*' (Explanatory statement attached to Resolution I., iii., 1923.)<sup>4</sup>

2. 'The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned.' (*Ibid.*)

3. 'It is for each Government to decide whether Parliamentary approval or legislation [*i.e.* the approval or legislation of its own (Dominion or British) Parliament] is required before desire for, or concurrence in, ratification is intimated by that Government.' (*Ibid.*)

4. In a multilateral treaty negotiated under the auspices of the League of Nations in which a ratification clause is inserted stipulating that the treaty shall only come into force when a certain number of ratifications have been deposited, this clause 'should take the form

<sup>1</sup> M. Lapointe, *ibid.*

<sup>2</sup> The Treaty of Lausanne furnished an important exception; while a Commercial Treaty between Canada and France made in 1921 was signed by the British Ambassador in Paris, *vide* Toynbee, *op. cit.*, p. 101. For

further contrary practice prior to 1926 *vide* Keith, *Responsible Government*, 1928, vol. ii. p. 902.

<sup>3</sup> For a list of these treaties see Lowell and Hall, *op. cit.*, p. 607.

<sup>4</sup> Cmd. 2768 (1926), p. 21. (My italics.)

of a provision that the treaty should come into force when it has been ratified on behalf of so many separate Members of the League.' (5th sub-sub-section of Sub-section (a) of Section vi. of the Report, 1926.)

These rules concerning ratification are of capital importance. The following points must be particularly noted :

Rule 1 definitely establishes, in what appears to be the clearest language, that ratification of a treaty in respect of a Dominion can only take place when the Government of that Dominion has specifically given its 'advice' to the King that he shall ratify. This definitely establishes a new constitutional convention, confirming the precedent of the ratification of the Treaty of Versailles in 1919, when the British Government desired to ratify before the Dominion Parliaments had had the opportunity to approve the treaty, and the Dominion Governments resolutely refused to allow them to do so, insisting that ratification should be delayed until they had authority from their respective Parliaments to prepare their own Orders in Council containing their formal 'advice' to the King. Sir Robert Borden was of opinion that that precedent had by itself definitely established the constitutional convention in question, for in 1922 he wrote :

'The constitutional convention of the British Empire, under which the final act of ratification by the King of a treaty signed on behalf of a Dominion *must be based on the assent of that Dominion*, was fixed by the practice of recent years.'<sup>1</sup>

In any case, the Report of 1926 leaves no doubt that it is now established, and that under this new convention no treaty can be ratified on behalf of a Dominion

<sup>1</sup> Report on the Washington Conference, cited by Lowell and Hall, 1927, p. 632.

unless the Government of that Dominion shall first have taken definite constitutional action to that end.

This rule is in no way affected by Rule 2, which provides that when more than one Member of the Commonwealth has signed a treaty, there shall be consultation between them as to how and when ratification shall take place. This still leaves it certain—indeed, only makes it still clearer—that there must be separate and specific ‘advice’ to ratify from each Government concerned.

For the explanation of Rule 2 is that consultation is required at the stage of ratification, as well as in the earlier stages of the negotiation of a treaty to which two or more Members of the Commonwealth are signatories, because of the form in which ratification is often carried out. It will be noted that there is nothing either in the Resolution of 1923 or in the Report of 1926 concerning the *form* of ratification. Probably in 1923 this was because it was assumed that the form was already established. Where a treaty was made by a single Dominion acting alone, a treaty which imposed obligations only on itself, an instrument of ratification was drawn up by the British Foreign Office on receipt of the Dominion Order in Council advising that the treaty be ratified; this instrument was signed and the Great Seal attached by the King or by the Secretary of State for Foreign Affairs on his behalf, and was forthwith deposited by the Foreign Office on behalf of the Dominion concerned. Where the treaty was one to which two or more Members of the Commonwealth were signatories, a single instrument of ratification was again drawn up when all the Orders in Council of the signatory Governments had been received. This single instrument set forth the fact that the King ratified the treaty in respect and on behalf of all the signatory Members of the Commonwealth. This was the procedure adopted for the Treaty of Versailles, for the

Washington Conventions of 1921, and for other treaties. It is plain that in order to make it possible for the single Act to be drawn up in a form approved by all, and to be deposited at a moment convenient to all, consultation among the signatory Governments was required.

But it is necessary to point out that neither before the Conference of 1923 nor since has there been such uniformity of practice as the drafters of the Resolution of 1923 seem to have assumed. There have been two important kinds of deviation from the method of a single Act of Ratification deposited on behalf of all the British signatories to a treaty.

First, a number of general conventions negotiated under the auspices of the League of Nations have been ratified at different moments by different Members of the Commonwealth, and therefore by the deposit not of a single Act of Ratification but of a number of separate Acts.<sup>1</sup> It is plain that this course must frequently be necessary unless the British and Dominion Governments are always to pursue an identical policy in respect of all general conventions, which frequent experience has shown they will not do. And when the different Governments of the Commonwealth do decide to ratify by separate instruments and at different dates, there is clearly no need for consultation at the stage of ratification, when the treaty has been finally negotiated and signed, and when its terms can no longer be changed in any way.

Second, and more important, ratification of some general international conventions has been effected in recent years by some Dominions by a wholly different method. This new method consists of the deposit with the Secretary-General of the League of Nations

<sup>1</sup> *E.g.* many of the League international conventions—for example, the Slavery Convention of 1926, etc.

*Vide* also Note III., p. 208, *infra*, concerning the ratification of the Kellogg Treaty of 1928.

of the copy of an official minute or other Government document which he registers as the ratification which is required. So far as the present writer is aware, it has so far only been used in respect of International Labour Conventions; it was so used first by the Union of South Africa, then in 1924 and since by the Irish Free State, and later still both by Canada and Australia. The Australian Government has ratified one Labour Convention by this means; the Canadian Government four; the Irish Government nine; and the South African Government three—a total of seventeen.<sup>1</sup>

There have been variations in form as between the different ratifications effected so far by this means by the four Dominions. In the case of the Irish Free State the document forwarded to the Secretary-General was a copy of an 'Order of the Executive Council' regarding a decision of the Executive Council to ratify; in the case of South Africa it was a copy of an 'Executive Council Minute' recommending the Governor-General 'to approve of the ratification of the said draft Convention'; in the cases of Canada and Australia it was a copy of an 'Order in Council' in which the Governor-General orders ratification.<sup>2</sup>

The essential paragraph of the Canadian document by which four conventions were ratified on March 11, 1926, reads as follows:

' . . . Therefore, His Excellency the Governor-General in Council, on the recommendation of the Secretary of State for External Affairs and with the concurrence of the Acting-Minister of Labour, is pleased to confirm and doth hereby confirm and approve the above four Draft Conventions on behalf of Canada; formal communication of such ratification to be made to the Secretary-General of the League of Nations and to the Secretary of State for Dominion Affairs.'

<sup>1</sup> For a list of these conventions vide Appendix III., pp. 403-4, *infra*.

<sup>2</sup> For the text of these documents vide Appendix III., pp. 404-8, *infra*.

Thus ratification of some important international conventions has been effected by four different Dominions by their own action alone, without even the formal intervention of the British authorities in London. In the form adopted by the Canadian Government it must be admitted that this method looks remarkably as if, in respect of these conventions, or of any others to which it may be applied, it involved the transference to the Governor-General of the right to exercise the royal prerogative in respect of the ratification of treaties.

It is said that this procedure has so far been confined to international agreements which have not been given what the Report of 1926 calls the form of a treaty between Heads of States; in other words, it has been confined to what the Treaty Resolution of 1923 described as 'agreements between Governments'<sup>1</sup>—that is to say, to instruments in which the name of the King does not appear in the preamble, the contracting parties being named as countries or Dominions. This may be true, but it is difficult to see that it has any constitutional significance. Smith and Corbett rightly point out that the distinction between 'agreements between Governments' and other treaties is a formal one. 'How,' they ask, 'can a Government, if it is to be distinguished from its state, be bound for ten years or for any other fixed period? If it is the state which is bound, then this kind of agreement differs in nothing but form from the traditional type of treaty.'<sup>2</sup> This argument is unanswerable. A treaty is none the less a treaty because it is made in the names of the countries which are the contracting parties. In fact, a great many treaties, including the Treaty of Versailles of 1919, were made in the names of countries and not of Heads of States.

Moreover, in the specific case under consideration no

<sup>1</sup> *Vide* Treaty Resolution of 1923, Section II., p. 393 n., *infra*.

<sup>2</sup> *Canada and World Politics*, p. 59.

one denies that the Labour Conventions which have been ratified by this new procedure of Dominion Order in Council are 'treaties proper,' and treaties of a most important kind. It is true that in respect of these Labour Conventions the word 'ratification' is used in a special sense, since there is, owing to the procedure of the International Labour Conferences, no usual stage of signature by plenipotentiaries. On the other hand, as McNair points out, 'once a Draft Convention has received the number of signatures stipulated for it . . . it becomes a proper treaty binding upon the States ratifying it.'<sup>1</sup> Thus ratification of a Labour Convention is in substance, if not in form, the same as ratification of other kinds of treaty: the definitive act by which a Government undertakes an international obligation. The new procedure adopted by the Dominions for Labour Conventions is therefore important; its validity has never been contested either by the British Government or by the Imperial Conference; and since it is far less cumbersome than the usual method, it constitutes a notable precedent of which more may perhaps be heard in the future.

There is one more important point about the rules on ratification which must be noted. It relates to Rule 4. Since ratification of a general convention is sometimes effected by a single instrument for two or more Members of the Commonwealth, the doubt used sometimes to arise whether their ratifications should be counted as *one* or *several* for the purpose of bringing the convention into force. In the words of the Report: 'The question has sometimes arisen . . . whether . . . *ratifications on behalf of different parts of the Empire which are separate Members of the League should be*

<sup>1</sup> Oppenheim, 1928 edition, i. p. 588, n. 3. Cf. also Report of the Committee of Experts for the Progressive Codification of International

Law, adopted by the Council of the League. C. 357, M. 130, 1927, v. 16.

*counted as separate ratifications.'*<sup>1</sup> Rule 4 answers this question by laying it down that the ratification of each Member of the Commonwealth is a separate ratification. The point might have been of great importance in 1921 when the Statute of the Permanent Court of International Justice was brought into force ; unless twenty-five ratifications had been received by September 1, 1921, the Second Assembly could not have set up the Court by electing the judges who were to compose it.<sup>2</sup> It was again of great importance in connection with the bringing into force of the Opium Convention of 1925, which provided for the creation of a Central Opium Board, the actual establishment of which was long delayed because an insufficient number of ratifications were deposited.

The Report of 1926, by definitely deciding that the ratification of each Dominion shall be counted separately, even when ratification has been effected by a single instrument, has once more given striking recognition to the fact that ratification takes place for each Dominion by its own act and will, and it has furnished one more proof that each Dominion is formally and officially regarded as a separate party to any treaty that it signs.

#### CONCLUSIONS CONCERNING THE TREATY RIGHTS OF THE DOMINIONS.

What is the meaning of all these rules of procedure in relation to treaties when they are considered as a whole ? Do they or do they not justify the claims that the Dominions have acquired the treaty-power, and that no Government other than that of a Dominion itself has any constitutional right to make an international engagement on its behalf ?

<sup>1</sup> Cmd. 2763 (1926), p. 24. (My italics.)

<sup>2</sup> All the British Commonwealth

Members of the League ratified the Statute by a single joint instrument, as for the Treaty of Versailles.

*Prima facie*, taking the rules at their plain face value, the correct answer would seem to be an emphatic affirmative.

But before this answer is justified in detail, it is relevant to consider why the rules were originally made. The answer is that they were made to settle the dispute between Great Britain and Canada concerning the procedure adopted for the making of the Treaty of Lausanne. The Treaty Resolution of 1923 was drawn up in order to remove the confusion of ideas shown to exist by the correspondence which had passed between Ottawa and London concerning the proceedings of the Lausanne Conference.

Now, in the course of that correspondence Mr. Mackenzie King, the Prime Minister of Canada, had laid down the following four principles concerning the making of treaties affecting the Empire as a whole at International Conferences :

(1) That Canada should be directly represented at such Conferences by a representative who should participate in the proceedings of the Conference. The appointment of such representative should be effected by full powers signed by His Majesty the King in the form of letters-patent authorising him to sign any treaties or conventions to be concluded for and in the name of His Majesty the King in respect of the Dominion of Canada, the Canadian Government having by Order in Council sanctioned the issuance of such full powers.

(2) That the plenipotentiaries so appointed should formally sign any treaties so negotiated on behalf of Canada.

(3) That treaties so signed should be submitted to the Canadian Parliament for approval.

(4) That the Canadian Government should signify its assent in respect of Canada to the final act of ratification by the King.<sup>1</sup>

<sup>1</sup> Cf. M'Kenzie, *A.J.I.L.*, July 1925, p. 504.

It was to meet these claims of the Canadian Prime Minister that the treaty rules of 1923 were made. Since these claims applied to treaties affecting the Empire as a whole, it was to be assumed that they applied *a fortiori* to bilateral or other treaties made by a single Dominion with a foreign Power; and in fact the action of the Canadian Government on the Halibut Treaty discussed above had clearly shown that Mr. Mackenzie King intended that they should so apply. Taken together, these claims constitute a powerful assertion of the right of Canada to be bound by no treaty which it has not itself made, by its own definite constitutional action. It is therefore of great importance that on every point the Canadian Prime Minister received the fullest satisfaction. Moreover, what was established by the Resolution of 1923 has only been amplified and made yet clearer by the additional rules and explanations of 1926. In every particular the national rights of the Dominions have been extended and confirmed.

What, then, is the total effect of the existing rules, as they have been described above? It may be summarised as follows:

1. A Dominion Government has the right to take part in any treaty negotiations initiated by the Government of any other Member of the Commonwealth, if it holds that its interests are likely to be involved.

2. General or group treaties are henceforward to be drawn up in a form which makes it absolutely plain that the signatory Dominions are 'on a footing of equality with Great Britain as participants in the treaties,' *i.e.* their plenipotentiaries must be named in the preamble, they must sign separately each in respect of his own Dominion, etc.

3. The plenipotentiary of a Dominion who negotiates and signs such a treaty on its behalf must hold a full power issued by the King on the advice of the Govern-

ment of that Dominion and indicating that he is entitled to act for that Dominion. No international treaty engagement can henceforward be made which will bind a Dominion unless such a full power has been issued to its plenipotentiary on the specific 'advice' of its own Government.

4. If a general or group treaty is made which is to impose obligations on more than one Member of the Commonwealth, no Dominion will be bound by it unless there is appended to it a separate signature written by its own plenipotentiary on its behalf.

5. If, on the other hand, a Dominion makes a bilateral treaty which imposes obligations on itself alone, the treaty will be signed by its own plenipotentiary and by him alone.

6. No treaty signed by a Dominion can be ratified on its behalf except at the instance of its own Government. Without its own constitutional action at this stage, therefore, no Dominion Government can be bound by *any* treaty.<sup>1</sup>

7. Every ratification of a general treaty by a Dominion shall be counted as a separate ratification for the purpose of counting the number of ratifying parties required to bring that treaty into force.

At every stage, therefore, in the preparation of a treaty, negotiation, issue of full powers, signature, ratification, every substantive action taken in respect of a Dominion must be taken by the agents of its own Government and in virtue of decisions come to by that Government. Moreover, the Government of a Dominion can take action at every stage on its own initiative, subject only to its fulfilment of the duty of consultation.

In the face of these facts, is it still possible for any one to hold that the Dominions have not acquired the treaty-power, so far at least as British constitutional practice is concerned?

It appears that Keith still takes this view, and that

<sup>1</sup> *Vide* Lewis, *B. F.I.L.*, 1925, pp. 35-6.

he adheres in substance to the doctrine which he expounded in 1923 and 1924.

In 1923, in discussing General Smuts' doctrine that the Dominions had achieved 'a position of absolute equality and freedom . . . among the other nations of the world,' Keith wrote that if this were true it would mean 'that there would be a real and fundamental change in the constitution of the Empire since the Armistice, and that no treaty arrangement could be entered into affecting any autonomous part of the Empire without the deliberate action of the Government of that part. A further deduction is that each autonomous part of the Empire is capable of exercising in independence of the other parts the treaty-power as regards itself.'<sup>1</sup>

He then proceeded to deny that either change had been made.

In 1924 he wrote: 'The Empire remains a unit of International Law which can be bound by treaties entered into by any plenipotentiaries duly accredited by the Crown on the advice of the Imperial Government. From the point of view of International Law the composition of the delegation which treats regarding the conclusion of treaties and signs the agreements arrived at, is a matter of indifference: these are purely internal matters, vital from the Imperial point of view, but negligible in international relations. Similarly the ratification of the peace treaties and the Washington agreements has been an act of the Crown on the advice of the Imperial Government; the fact that this advice was tendered only after the Dominion and Indian Governments had concurred and had obtained the approval of their Parliaments, is a matter of fundamental constitutional importance, but it lies outside the province of International Law.'<sup>2</sup>

<sup>1</sup> *Journal of Comparative Legislation*, November 1923, p. 162.

<sup>2</sup> *Constitution, Administration, and Laws of the British Empire*, p. 47.

In 1927, writing of the Report of 1926, he says : ' As regards the negotiation of treaties, no change of fundamental importance was made. The Report leaves unaltered the rule that treaties proper can be made by the King only ; that they can be signed only in virtue of full powers issued by the King on the authority of a recommendation of a British Minister, however faithfully he may act in his recommendation on the advice of a Dominion Government ; and that ratification can only be expressed in the same way.'<sup>1</sup>

There are in this argument two points : first, that treaties proper can only be made by the King ; second, that full powers, instruments of ratification, etc., are issued by the King not on the advice of the Dominion Government but on that of the British Government in London. They are precisely the arguments used by Keith in 1924, and previously, to prove that the Dominions had *not* acquired the treaty-power. They may be considered in turn.

The first argument is briefly this : The King is the party to all treaties : he is the party as Head of a single international person, the British Empire ; the Dominions are parts of this Empire ; therefore they cannot be for purposes of treaty-making separate persons of International Law, nor have any real international treaty rights of any kind.

Rolin has stated this argument in the following words : ' Si le roi de la Grande Bretagne était en même temps le roi du Canada, etc. . . . et était exclusivement conseillé par des ministres différents dans chacun de ces pays, ceux-ci seraient bien des Etats distincts.' That is to say, if the King held in fact the same position in each of the Dominions as he does in Great Britain,

<sup>1</sup> *J.C.L.*, February 1927, p. 86. *Vide* also *Responsible Government*, 1928 ed., vol. ii. pp. 909-10. For another exposition of much the

same view *vide* Smith and Corbett, *Canada and World Politics*, pp. 53-4, 149, *et passim*.

the whole thing would be different, and the Dominions could have effective international rights. But in that case, says Rolin<sup>1</sup>—and Keith would in some passages appear to have a disposition to agree—they are separate sovereign states, and no longer connected by any legal bond (except, perhaps, a personal union) to the British Empire, of which they claim to form a part.

It may be submitted that this doctrine rests on a double fallacy.

First, it denies by necessary implication what is universally admitted, that the King is in fact King of the Dominions precisely as he is King of the United Kingdom, and that he holds in the Dominions the same position that he holds at home. This is the only meaning that can be attached to the constitutional doctrine laid down in the memorandum circulated to the British Empire delegation in Paris on March 12, 1919, by Sir Robert Borden on behalf of the Dominion Prime Ministers there assembled—a doctrine never disputed by the British Government, either then or since. In that memorandum the Prime Ministers declared :

‘The Crown is the supreme Executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministers within different constitutional units.’<sup>2</sup>

In support of this interpretation of the doctrine of the Dominion Prime Ministers, the authority of Sir Cecil Hurst may be quoted once more. Discussing the issuance of full powers to a Dominion delegate, he says :

*‘It is the King who issues him the full power, but the King is the King of all the Dominions and not of one*

<sup>1</sup> *R.D.I.*, 3rd Ser., vol. iv., 1923, p. 223. Cf. *supra*, p. 124.

<sup>2</sup> Cf. also a statement in similar terms made by Sir R. Borden to the Imperial War Conference in 1917.

Vide *Proceedings of Imperial War Conference*, p. 59. Cf. also, for a valuable discussion of the point, Hall, *British Commonwealth of Nations*, pp. 237 *et seqq.*

*only.* If satisfaction was to be given to the desire of the Dominions that they should take part in the conclusion of peace as separate political entities, the full power which each Dominion representative was to receive must be limited in some way to the Dominion which he represented. *He was not merely to act on behalf of the King as sovereign. What Canada wanted was that the Canadian representative should sign on behalf of Canada, not that he should sign generally on the King's behalf . . . consequently* words were introduced into the full powers issued by the King to the Dominion plenipotentiaries which restricted their authority to that of signing on behalf of the Dominion on whose behalf they were acting.<sup>1</sup>

This statement by Sir Cecil Hurst is conclusive on the point, and it shows that the view put forward by Keith in 1923 and 1924 can no longer be held. It shows, too, that since the King is King in each of his Dominions as well as of Great Britain, it is perfectly possible for him to agree to a treaty with a foreign Power or foreign Powers on behalf either of any one or of several or of all of the 'separate political entities,' as Sir Cecil Hurst has called them, of which he is the Head. If a treaty is made in the name of the King which is to bind the whole British Commonwealth, the King must now make with the foreign parties to that treaty six separate contracts, or seven, if India is included—i.e. one for each 'separate political entity.' It must be added that there is no inherent difficulty, still less impossibility, in such a constitutional arrangement.

Nor, second, does it follow that because the Dominions have the right to make treaties, because, that is to say, for treaty-making purposes they are international persons, therefore they must be fully sovereign independent states, and their legal connection with the British Empire must be either at an end or reduced to

<sup>1</sup> *Op. cit.*, p. 72. (My italics.) *Vide* point by Sir W. Harrison Moore, *J.C.L.*, Feb. 1926, pp. 21 *et seqq.*  
also an important discussion of this

the negligible bond of a 'personal union.' To maintain such a view is to fall into the aged fallacy that sovereignty is one and indivisible. It is now agreed that 'sovereignty' may be infinitely divided, and there is accordingly no difficulty in the conception that, for some purposes of International Law, Dominions may be legal 'persons,' while for other purposes they may still be part of a single unit called the British Empire.<sup>1</sup>

A third argument may be brought against this first contention: that it would reduce to nonsense the dogma of the Report of 1926 that the Members of the British Commonwealth are 'equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs.' Since equality of status is recognised to be the 'root principle' of inter-Imperial relations, it is plain that no proposition which has this result can now be seriously entertained.

We may pass on, therefore, to Keith's second point: that the Dominions have not the treaty-power, because the full powers, instruments of ratification, etc., which their Governments demand are in fact granted by the King, not on the 'advice' of his Dominion Ministers, but 'on the authority of a recommendation of a British Minister.'<sup>2</sup>

Since this proposition is peculiarly difficult to reconcile with the plain terms of the Report, it may be well to reproduce *in extenso* the argument by which it is defended. Here it is:

'The idea that the King could act without any ministerial advice from the Imperial Government, simply on

<sup>1</sup> Cf. Chapter VIII., *infra*, for a further discussion of this complicated and important point, and of the theory that the King is a single international person.

<sup>2</sup> Cf. also *Responsible Government*, 1928 ed., ii. p. 900, where Keith says:

'The grant of full powers is a matter in which the King acts and can act only on the advice of the Imperial Government conveyed through the Secretary of State for Foreign Affairs, and . . . ratification is due to the same source.'

a submission by Dominion Ministers, is an impossibility. The people of the United Kingdom would have formally by assent in Parliament to homologate such a mode of procedure, and it may be regarded as most improbable that they would consent that their sovereign should at the same time act as the independent sovereign of a Dominion. But, at any rate, the view that a vital change can be introduced *sub silentio* is inadmissible. A much more plausible opinion is that of Professor Allin, who is indeed convinced that Canada must eventually obtain complete sovereign status, but who merely holds that the Imperial power of control as regards treaties, though still formally present, is virtually lost, as the right of refusing ratification is as obsolete as that of disallowing Acts. This, however, clearly goes too far. That the Imperial Government would refuse assent to a Bill purporting to sever the ties between the Irish Free State or the Union of South Africa and the Empire is at present certain; assent could be accorded only after full argument at an Imperial Conference, where the views of the Empire as a whole can be ascertained. Similarly, if any part of the Empire desired to conclude a treaty gravely injurious to another part, or parts, it would not merely be the right, but also the clear duty of the Imperial Government to suspend ratification pending full discussion by an *ad hoc* conference. . . .<sup>1</sup>

It must be said with great deference that in this argument the legal or constitutional difficulties of the doctrine put forward are not really faced. Indeed, the argument is rather political than legal. And even as a political argument it is not convincing. On the last hypothesis taken, for example, the duty of the Imperial Government to secure consultation on a 'gravely injurious' treaty could not, under the Report of 1926, justify suspension of ratification, since the consultation required for such a purpose must have taken place

<sup>1</sup> *Journal of Comparative Legislation*, February 1927, pp. 86-7.

before negotiations for the treaty had even been begun. That would be the normal and necessary result of the new conventional constitutional duty of consultation, subject to which all the treaty rights both of the Dominions and of Great Britain must now be exercised.

And if, *per impossibile*, a Dominion Government in making such a 'gravely injurious' treaty had failed to fulfil its duty of consultation, the right of the British Government to demand such consultation before ratification took place would arise, not from a power of discretion in withholding ratification, but from the constitutional convention of consultation itself. Moreover, in this respect the British Government would have no greater rights than any of the Dominions whose interests might be affected by the treaty; and if it were the British Government which had made a treaty affecting Dominion interests without consultation, the Dominions on their side could exercise the same right of intervention directly they had knowledge of what the British Government had done. Keith's argument, in short, does not affect the questions of constitutional right involved; it simply leads to the conclusion, with which every one agrees, that without proper consultation the treaty arrangements of 1923 and 1926 will create a state of chaos.

But apart from these considerations, there are several reasons which lead to the conclusion that this doctrine is wholly wrong; that it is in fact the Dominion Governments which 'advise' the King concerning their full powers and instruments of ratification; that the intervention of a British Minister is wholly formal; and that therefore the Dominions have now acquired the treaty-power. These reasons are as follows:

First, the Resolution of 1923 says plainly that 'the ratification of treaties imposing obligations on one part of the Empire is effected at *the instance of the Government*

of that part.’<sup>1</sup> Sir Cecil Hurst interprets this to mean as follows :

‘The ratification of a treaty is the act of the King, and constitutionally the King must act on the advice of his Ministers when he gives the ratification, *and the Ministers on whose advice he acts must be the Ministers responsible for the part of the Empire affected by the treaty.*’<sup>2</sup>

There is no other rational interpretation of the Resolution of 1923; and even if there were, Sir Cecil Hurst’s opinion would have to be accounted as of great authority.

Second, there is the precedent referred to above of the Labour Conventions ratified by four different Dominions by simple Order in Council without even the formal intervention of a British Minister. Were those ratifications valid? If they were not, why has their validity never been contested? If they were, how can their validity be explained except by admitting that the Dominions have been permitted to exercise the treaty-power?

Third and finally, there has been a reasoned statement on the point by the Prime Minister of Canada, a statement which stands on record as an authoritative interpretation of the views of the Imperial Conference of 1923, which has never been challenged since it was made in 1924, and which must therefore, it is submitted, be accepted as conclusive. Here is an admirably summarised account by Lewis of the debate in the Canadian House of Commons in which this statement by the Prime Minister was made :

‘Mr. Meighen asked the question, “Upon whose recommendation does His Majesty act in authorising the execution of a treaty by the appropriate Dominion representative?” and Mr. Mackenzie King replied that he could best illustrate the point of view which was

<sup>1</sup> Cmd. 2768 (1926), p. 21 n.

<sup>2</sup> *Op. cit.*, p. 84. (The italics are mine.) Cf. also Note III., p. 203, *infra*.

expressed at the Imperial Conference of 1923 by recalling an answer made by Sir Cecil Hurst to a question that was asked by one of the Dominion Prime Ministers: "In the event of advice being given to His Majesty which might prove to be not proper advice, and the necessity should arise for impeaching the Minister or the Prime Minister who had given it, would it be," asked Sir Cecil, "the British Prime Minister, or the Secretary of State for Foreign Affairs, or the Minister or Prime Minister of the Dominion concerned, against whom impeachment proceedings should be properly started?" Mr. Mackenzie King added, "I gathered, I think rightly, that the interpretation which the Foreign Office placed on the matter is that the Government of the Dominion which was tendering the advice in such a case was the Government that was responsible; *that it was advising His Majesty directly in regard to matters which were of sole concern to the Dominion*; that in the transmission of that advice the *British Government was acting as the channel through which that advice was transmitted, but it was not the Government which was formally tendering the advice.*" Mr. Meighen asked why, if the approval of the British Government was not essential and not obtained, the transmission should take place through the British Government. Mr. King replied that "these are all matters of constitutional development. Up to the present all communications have gone to His Majesty through the British Government. It will also be seen that it is obviously desirable to have some central agency or channel through which all communications may pass and where they may be noted. I think it would be palpably unwise to have different parts of the British Empire communicating direct with His Majesty without any knowledge on the part of the Empire that such advice was being given in that way." Mr. Meighen challenged this statement, and suggested that the function of the British Government would consist in making a recommendation; having considered the terms of the treaty and being satisfied that the matter was

principally the concern of Canada, the recommendation would be given cheerfully, but it would "signify to His Majesty the approval of the British Government." *Mr. King pointed out in reply that his understanding of the situation was arrived at after a conference with the British authorities and the Prime Ministers of other Dominions in the presence of Lord Curzon*, who as Secretary of State for Foreign Affairs presided at a subsidiary conference for the purpose of considering these matters. He concluded, "I believe I have accurately stated the position; it is certainly the basis upon which this Government is proceeding." <sup>1</sup>

Writing in 1928, Keith insists that if the Canadian Government gives 'advice,' 'the responsibility of endorsing it is Imperial'; and on the statement by Sir Cecil Hurst cited by Mr. Mackenzie King he says:

'The fact seems to have been forgotten that changes in the constitution of Empires are not made by *obiter dicta*, cited at second hand, of civil servants, but by resolutions of Parliaments and responsible Governments.' <sup>2</sup>

To which it may be replied that Sir Cecil Hurst was plainly speaking not for himself, but for the British Government; that his view was accepted 'by the Prime Ministers of the other Dominions in the presence of Lord Curzon'; and that it was an interpretation of a 'resolution of responsible Governments,' namely, the Treaty Resolution of 1923, which was the cause of the discussion which Mr. Mackenzie King reported to his Parliament. There can be no doubt, therefore, that Mr. Mackenzie King's statement sets forth the accepted constitutional doctrine on the point.

Fourth, if the British Ministers who perform the formal functions of preparing full powers for Dominion

<sup>1</sup> *Canadian Hansard*, vol. lix. 1925, pp. 34-5. (The italics are mine.)  
p. 574. The above is a summary of  
the debate made by Lewis, *B. Y. I. L.*, ii. p. 900.

delegates and of attaching the Great Seal to instruments of ratification for Dominion treaties are thereby giving substantive 'advice' to the King, that involves a plain contravention of the principle laid down in the Report of 1926, that 'it is the right of the Government of each Dominion to advise the Crown *in all matters* relating to its own affairs.'<sup>1</sup> It may be recalled that the Balfour Committee went on to elaborate that principle. 'Consequently,' they said, 'it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.'<sup>2</sup> Nobody can deny that a treaty negotiated for a Dominion by its own plenipotentiary is a 'matter appertaining to the affairs' of that Dominion; but if such a treaty can only be signed and ratified 'on the authority of a recommendation of a British Minister,' then the British Minister must have authority to recommend that it be *not* signed or ratified, in which case the principle cited above does not apply in the vitally important matter of treaties, and the Balfour Committee were guilty of writing nonsense. No such conclusion can be admitted for a moment.

Fifth, no one denies that His Majesty's Government in Great Britain has the right to make treaties with foreign Powers in its own discretion and subject to no constitutional limitation but that of the conventional duty of adequate prior consultation. But if the Government of Great Britain has that right, the Governments of the Dominions have it too. Keith's doctrine obviously implies that the Dominions are subordinate to Great Britain in this respect. But such a doctrine makes nonsense of the dogma that the Dominions are 'equal in status' with Great Britain in all respects;

<sup>1</sup> Cmd. 2768 (1926), p. 17. (My italics.)

<sup>2</sup> *Ibid.*

it flies full in the face of the Report of 1926, which declares that the Dominions are 'in no way subordinate in any aspect of their . . . external affairs.' And if the Dominions are 'equal in status' with Great Britain, they must be equal both in rights and in the power to exercise their rights effectively; otherwise language has lost its meaning, and the whole Report of 1926 is founded on a fraud.

It may be concluded, therefore, that it is the Dominion Governments who exclusively and decisively advise the King on treaty matters which affect 'themselves.' It follows that the Dominions have now acquired, at least so far as British constitutional practice is concerned, the treaty-power, and have acquired it without any constitutional limitation of any kind, excepting only the conventional duty of prior consultation discussed above.<sup>1</sup>

It remains to be considered what is the real significance of the intervention of a British Secretary of State for Foreign Affairs in the preparation and the issue of full powers and instruments of ratification. If the Secretary of State does not 'advise' the King, what does he do? Why is the old procedure for drawing up full powers and instruments of ratification still retained?

The first answer, no doubt, is that the old procedure has not been adhered to by the Dominion Governments in respect of all the treaties and conventions they have made, with regard either to full powers or to ratification.

<sup>1</sup> Cf. declaration by M. Rudolphe Lemieux, Speaker of the Canadian House of Commons, on August 27, 1928, before the Empire Parliamentary Association: 'Le Canada jouit maintenant du droit de conclure des traités et les traités conclus par la Grande Bretagne ne le tient pas.

L'intervention de Downing Street est désormais dans un passé lointain. Le Canada est autonome au sens le plus plein du mot.' *Journal de Genève*, August 29, 1928. Cf. also M. Lapointe, cited by Lowell and Hall, 1927, p. 681.

At the International Labour Conferences their delegates have helped to make many conventions with no other credentials than those which they received from their own Governments at home. It is true that in International Labour Conferences conventions are not signed, and that therefore it may be held that full powers are not in any case required. The argument is not conclusive, for in the past the right to negotiate at all was only conferred by full power; but even if it were, the further fact remains, that at the Assembly of the League of Nations Dominion delegates have similarly helped to draw up treaties, and have actually signed those treaties with only the credentials their own Governments gave them; examples are the White Slavery Convention of 1921, and the Slavery Convention of 1926. (See Note II. to Chapter V., p. 208, *infra*.)

Similarly with regard to ratification, the Dominion Governments, as shown above, have ratified a number of international conventions, and have registered their ratifications, in virtue of their own Orders in Council alone and by action of the Governor-General and the Cabinet itself without the formal intervention of a British Minister in any way.

But of course it is true that in respect of most Dominion treaties the old procedure is retained. It is retained because it is convenient. Mr. Mackenzie King no doubt was right when he said that Dominion advice continued to pass to the King through the intermediary of a British Minister, partly as a constitutional survival of earlier practice, partly because practically it is a good plan to have 'a central agency or channel' of communication for all the Members of the British Commonwealth. The British Minister, in short, acts in the preparation and issuance of full powers and instruments of ratification as an inter-Imperial secretariat for the Commonwealth; he does the office work;

but he has no share at all in the constitutional decisions to be made.

In various places in his writings before and since the Conference of 1926, Keith has explained that such a position in respect of Dominion treaties is one which the British Secretary of State could not possibly accept; that it would reduce him to the level of an 'office-boy' or 'private secretary' to the King; that he cannot possibly be divested of constitutional responsibility for the 'endorsing' of any advice which Dominion Ministers may give, and which he may transmit for the King's approval. It is relevant to point out that an exactly analogous process has occurred in respect of Dominion legislation; that the British Minister who transmits Dominion Acts of Parliament to the King for the Royal Assent has no constitutional right to advise that these Acts be not approved, and therefore in no way 'endorses' the advice the King receives from his Dominion Governments. In other words, as Sir W. Harrison Moore has put it:

'Practice does already recognise cases in which the Minister who is the instrument of the King's action is not responsible for the wisdom or justice or expediency of that action, though in such cases he does advise and co-operate as a constitutional Minister of the Crown.'<sup>1</sup>

Since this has happened with regard to Dominion legislation, there is no reason why it should not happen with regard to Dominion treaties. In fact, it is precisely the position that is now recognised to exist. The British Minister has no share in the constitutional decisions to be made about Dominion treaties, because, in the happy phrase used by Duncan Hall, the Dominion Governments have been 'given access' in this matter of treaties to the constitutional prerogatives of the British

<sup>1</sup> *J.C.L.*, February 1926, p. 23.

Crown.<sup>1</sup> A new convention of the Constitution has been accepted—a new convention which Keith himself was the first to propose. On July 12, 1919, he published a letter in the *Times* in which he suggested that the difficulty in respect of the issuance of powers to the Dominion Ministers by the Crown might be overcome by the adoption of the ‘constitutional convention that the issuance of Full Powers to Dominion representatives on the request of their Government should be *incumbent* on the Secretary of State for Foreign Affairs as a *ministerial function excluding any exercise of discretion on the part of the Government of the United Kingdom*.’<sup>2</sup> The necessary change could not have been more happily and accurately expressed than in these words, and they represent precisely what has happened: Keith’s proposal has been adopted, and a new *constitutional convention* has thereby been created which modifies the previously existing *legal right*. Allin’s doctrine,<sup>3</sup> therefore, which Keith rejects, must be accepted; the Imperial power of control as regards treaties, though still formally present, is constitutionally lost, for the right of the British Secretary of State to advise the King to refuse to ratify a Dominion treaty is as obsolete as the King’s right to disallow an Act of the British Parliament. By the letter of his legal right, perhaps, he may do so; by the working rule of constitutional law he certainly may not.

Nor can it be admitted that this new conventional rule has been introduced, as Keith says, *sub silentio*. On the contrary, the prolonged discussions of the Imperial Conferences from 1917 onwards, the numerous speeches of Dominion Prime Ministers, the Treaty Resolution of 1923, the Report of 1926, together

<sup>1</sup> Vide *British Commonwealth of Nations*, passim, and an important article in the *Journal of Comparative Legislation*, October 1920, pp. 196 *et seqq.*

<sup>2</sup> The italics are mine.

<sup>3</sup> Cf. *supra*, p. 192.

with the explicit statement of Mr. Mackenzie King which has been quoted, together make a body of public and official declarations on the matter more considerable than those made on many of the important changes and developments of the British Constitution in the past. It is indeed relevant to repeat that vital changes in that Constitution have been introduced in much less formal manner than by the solemn adoption by seven Governments of resolutions and reports drawn up in the Imperial Conference.<sup>1</sup>

Nor, it may be added, is there any reason to believe that these new conventional rules about Dominion treaties will produce the political difficulties which Keith foresees. It is to obviate these difficulties that the new constitutional convention about 'consultation' has been agreed to. There is no ground for thinking that that convention will not achieve its purpose; the Governments of the Dominions accepted it with a full comprehension of what it meant and, unless the public declarations of their statesmen were insincere, with a full determination to make it work.<sup>2</sup> There would be more serious cause for anxiety about the future if it were believed that the Dominions, having been allowed freely to negotiate and sign their international treaties with foreign Powers, might then be faced by the blank refusal of the British Government to allow the King to ratify them. That situation, which some writers appear to contemplate with calm, might well strain the fabric of the British Commonwealth to

<sup>1</sup> Cf. *supra*, pp. 5, 39, 45, 133.

<sup>2</sup> This is also the answer to Smith and Corbett, who argue (*Canada and World Politics*, pp. 53-4) that the 'necessary part assigned to the Secretary of State in the appointment of plenipotentiaries and ratification does imply the right to scrutinise the subject matter of proposed negotiations and the terms

of the draft treaty'; that it does give him 'potential control.' To them this 'potential control' is a definite constitutional limitation on the treaty rights of the Dominions. The Secretary of State needs no such 'right to scrutinise,' because under the 'consultation' convention he must be fully informed both before negotiations begin and at every subsequent stage.

breaking point. Compared to such a danger, the risks involved in Dominion acquisition of the treaty-power are slight indeed.

#### GENERAL CONCLUSIONS CONCERNING THE STATUS OF THE DOMINIONS IN THE GENERAL SPHERE OF INTERNATIONAL LAW.

What, then, is the whole effect of the Report of 1926 upon the status of the Dominions in the general sphere of International Law? What rights of international action has it conferred upon them? What measure of international personality have they acquired?

Keith does not hesitate to say, writing in 1928, that:

‘Outside the actual sphere of League operations the Dominions remain essentially in their former status regarding foreign affairs.’<sup>1</sup>

On the other hand, a distinguished authority on International Law, McNair, writing also in 1928, reaches a different conclusion:

‘There can be no question that Australia, Canada, the Irish Free State, Newfoundland, New Zealand, and South Africa have acquired a position in International Law and in the Family of Nations. They are entitled . . . to exercise the right of legation . . . as regards those states which are willing to have diplomatic relations with them. They are entitled to make treaties . . . with foreign states. . . . As a matter of status, Great Britain and the Dominions are fully self-governing units entitled to the rights and subject to the duties of Members of the Family of Nations.’<sup>2</sup>

There is no doubt that the effect of the above discussion is to support McNair’s rather than Keith’s

<sup>1</sup> *Responsible Government*, 1928 ed., p. 893.

<sup>2</sup> Oppenheim, 4th ed., 1928, vol. i.

pp. 198-9. *Vide* the whole of §§ 94a and 94b for a valuable discussion in support of these conclusions.

conclusion. The effect of that conclusion is, indeed, so clear, that our summary of it may be brief.

The Report could not by itself confer upon the Dominions rights of any kind in International Law. It could only create for such rights a solid basis in the public law and constitutional practice of the British Commonwealth; it could only confer upon the Dominions the effective constitutional power to exercise such rights if the foreign Members of the international Society of States were willing that they should.

That the Report has done. It has so codified and confirmed the previously evolving practice of the Commonwealth as to establish a firm constitutional basis for an important body of Dominion rights in international affairs.<sup>1</sup>

What are those rights ?

They include the right of a Dominion to open negotiations on any subject, technical or political, with any foreign Power; the right to establish direct diplomatic relations with foreign Powers, by setting up its own diplomatic missions in their capitals, and conversely by receiving diplomatic missions from them; the right to create its own consular services abroad, and to decide whether it will receive foreign consuls on its own territory; the right to be represented in international conferences of every kind by its own separate delegations; the right to be bound by no international obligation, active or passive, to which it has not itself specifically agreed; the right to appoint its own plenipotentiaries to negotiate international treaties on its behalf; the right to sign such treaties through its

<sup>1</sup> As shown above, executive or legislative action by Dominion Governments or Parliaments is also required to put these rights into effective application. (*Vide* p. 137. *supra*.) It has been shown in the course of this chapter that such

action has in some matters already been taken by certain Dominion Governments and Parliaments. But even before it is taken, the rights of the Dominions exist, and may be exercised at their discretion.

own plenipotentiaries, and to secure their ratification when it so desires.

These rights, in so far as they relate to the creation or acceptance of international obligations of any kind, must be exercised subject to the conventional duty of consultation. This does not in any way affect the existence or the nature of the rights, but merely the way in which they must be used. The conventional duty of consultation, it may be added, is no onerous burden on the Dominions; it is merely a constitutional device for the better promotion of the common interests which they share. The world would be a better place if all the Members of the international Society of States were to adopt the principle of this convention as their guiding rule of action in their international relations with each other.

These rights, if they are effectively established in International Law, will confer on the Dominions an international status or 'personality' of the most important kind. How can such status or 'personality' be denied to a 'political entity' which can negotiate, establish legations and consular offices, make treaties, send its delegates to take part in international gatherings of every kind?

The only question which remains, therefore, is whether foreign Powers will recognise the exercise of these rights by the Dominions, and so make them definitely effective in International Law. In answer to that question it may be repeated that recognition by foreign Powers has already been given, at least in a considerable measure. In British constitutional law the process of recognition may, since the Report of 1926, be held to be complete; the process of international recognition is not yet complete, but it is well advanced. A Great Power, not a Member of the League of Nations, has exchanged legations with Dominions, is

negotiating concerning the establishment of Dominion consuls, has concluded treaties with Dominions. It can hardly be expected that foreign Members of the League will fail to follow where a non-Member has given so remarkable a lead.<sup>1</sup> Indeed, two of the most important foreign Members of the League, France and Japan, have already begun to follow. Moreover, many foreign Powers of various kinds and standing have negotiated informal agreements with the Dominions, and have established informal relations with them, in the past. At international conferences the position of the Dominions is in technical conferences well established, and at such conferences the Dominions have often exercised their liberty to pursue an independent policy of their own quite different from that which Great Britain has pursued. It is difficult to believe that the recognition of their position at non-League political conferences will not soon be equally complete.<sup>2</sup>

Sir Cecil Hurst has not hesitated to speak of the 'distinct international personality'<sup>3</sup> of the Dominions. In the light of the facts which have been given, there can surely be no doubt that he is right, and that in the general sphere of International Law, as in the League of Nations, the Dominions have now acquired a body of rights which confers upon them a measure of international personality or status of an important kind. As, under the pressure of the inexorable economic and scientific forces of the age, their international relationships develop, and their rights are exercised more widely and more generally than they are at present, this conclusion will be justified even more plainly than perhaps it is to-day.

<sup>1</sup> Cf. also the important declaration by Mr. Elihu Root cited on p. 129, *supra*.

<sup>2</sup> Cf. also the facts discussed on pp. 161-2, *supra*.

<sup>3</sup> *Op. cit.*, p. 92.

## NOTES TO CHAPTER V

## I

No mention has been made in the above chapter of incidents connected with the recognition of the Soviet Government of the U.S.S.R. in 1924. When Mr. Ramsay MacDonald became Prime Minister of Great Britain in that year he proceeded forthwith to accord recognition to the Soviet Government, and in consequence a Soviet diplomatic mission was established in London. Mr. MacDonald took this action without previous consultation with the Dominions, but in form on behalf of the British Empire as a whole. This action, therefore, says Keith, 'clearly bound the whole Empire.'<sup>1</sup>

Nevertheless, Mr. Mackenzie King shortly after (on March 24) made a separate recognition of the Soviet Government by Note to M. A. Yazikoff, in consequence of which Soviet agents (a so-called 'trade delegation' and not a diplomatic mission) were received in Canada.

In May 1927 the British Government broke off diplomatic relations with Moscow, and the Soviet mission was in consequence withdrawn. A few days later (on June 3, 1927) the Canadian Government took separate action to the same effect, informing the Soviet Government that the Trade Agreement of 1921 had ceased to apply to the Dominion of Canada, and in consequence the Soviet agents who had been received left Canadian soil.

It may be that this separate action taken by the Canadian Government on two occasions was, as Keith says, in law 'a mere nullity' and of no valid legal effect. It must be noted, however, that the Canadian Government did not act on the strength of the British recognition or breach, but on the strength of their own diplomatic action, which thus had at least practical effect on the relationships of the Canadian and Soviet Governments. The episode is therefore of considerable interest as a constitutional precedent connected with the direct diplomatic relationships of Dominion Governments with foreign Powers.<sup>2</sup>

<sup>1</sup> *Responsible Government*, 1928 ed., ii. p. 906. In August 1924 the Prime Minister of Australia in a speech admitted that the recognition legally bound the whole Empire, but said that the Dominions had received

assurances that the error of non-consultation would not be repeated.

<sup>2</sup> For an account of these proceedings *vide* Keith, *op. cit.*, pp. 906-7, 1252 n. 2, and *J.C.L.*, vii. p. 103.

## II

(*Vide* p. 199, *supra*)

The White Slavery Convention of 1921 was signed by the Dominion representatives in virtue of the credentials given to them by their Governments for the general purposes of the Assembly.

The Slavery Convention of 1926 was signed—

by the representative of South Africa in virtue of letters from the Office of the Prime Minister of South Africa and from the High Commissioner for South Africa in London ;

by the representative of New Zealand in virtue of a letter from the High Commissioner for New Zealand in London ;

by the representative of the Irish Free State in virtue of a letter from the Free State Minister of External Affairs ;

by the representative of Canada in virtue of a letter from the Canadian Acting Under-Secretary for External Affairs ;

by the representative of India, without any special document other than his General Assembly credentials.

## III

(*Vide* pp. 179 and 194, *supra*)

The Kellogg Treaty for the Renunciation of War, signed in Paris on August 30, 1928, was ratified by Great Britain and the Dominions simultaneously on March 16, 1929. Ratification was effected by the deposit in Washington of *seven separate instruments* (India also participating). These instruments were all prepared by the British Foreign Office and signed by the King under the Great Seal. The British Ambassador deposited the British instrument and also the Australian, New Zealand, South African, and Indian instruments on behalf of the Governments of those Dominions. The Canadian and Irish Ministers deposited the instruments binding their respective Governments. So far as the author is aware, this is the first occasion on which ratification of an important political treaty has been effected by separate instruments, and it is therefore a notable precedent.

## CHAPTER VI

### THE CONSTITUTIONAL UNITY OF THE BRITISH COMMONWEALTH

It was said in Chapter II. that the sentiment of union among the Members of the British Commonwealth was no less a fundamental fact of the Imperial system than the nationhood of the Dominions.<sup>1</sup> That has become increasingly true as the nationhood of the Dominions has developed. Imperial unity is not merely a phrase in the perorations of British and Dominion statesmen ; it is a political reality of the most important kind. General Smuts, the great protagonist of Dominion rights, in the very speech in which he claimed that South Africa had in the League of Nations 'exactly the same advice and representation' as Great Britain, and had it 'absolutely and independently of England,' went on to say that the Government of South Africa 'were equally anxious to see that nothing was done which would lessen the ties which bind together the British Empire.'<sup>2</sup> Another protagonist of Dominion rights, even more ardent than General Smuts himself, General Hertzog, spoke thus in his opening speech to the Imperial Conference of 1926 :

'We are prepared to co-operate to the fullest extent in laying as solid as possible the foundation of our Commonwealth of Nations, so as to make it as durable as it can be, and here I wish to say a few words as to

<sup>1</sup> Cf. *supra*, pp. 32-4.

Union Assembly, 1919. Cited by Hall, *British Commonwealth of Nations*, p. 339.

<sup>2</sup> Speech in treaty debate in the

South Africa's attitude in regard to the Empire or British community of nations. It has our hearty support, and will ever have our hearty support, irrespective of races and parties, so long as it is . . . a commonwealth of free, independent nations.' <sup>1</sup>

These two Dominion statesmen voiced a political conviction common to the overwhelming mass of the nations who make up the British Commonwealth. There can be no question that politically the Members of that Commonwealth are, in the phrase of the Report of 1926, in a 'special relationship' <sup>2</sup> with each other.

They are equally in a 'special relationship' from the legal point of view. There are legal bonds, a constitutional relationship, between them which do not exist between the other Members of the international Society of States. It is less than fifteen years since, by universal admission, the British Empire was in virtually every way a single unitary person in International Law. In 1914 Westlake's definition of colonial dependencies was still true of Canada, Australia, New Zealand, and South Africa :

'For international purposes they form one whole with it [the Mother Country]. They form with it one Dominion or set of Dominions, represented abroad by the parent or supreme state.' <sup>3</sup>

Since then they have asserted their nationhood in international affairs, and in doing so have acquired, or are acquiring, the effective legal status which has been described. In the process of acquiring this effective status they have modified, and profoundly modified, the constitutional arrangements of the Imperial system; they have not destroyed the legal and constitutional bonds that make the British Empire still a single and effective entity in the world of states,

<sup>1</sup> Cmd. 2769 (1927), p. 24.

<sup>2</sup> Cmd. 2768 (1926), p. 23.

<sup>3</sup> *International Law : Peace*, p. 41.

when the Members of the Commonwealth choose that it shall be so.

It is the purpose of this chapter to discuss the legal bonds that still remain. There is no need to do this in the detail in which the international status of the Dominions has been discussed. For the present purpose all that is required is an outline sketch of the essential principles upon which the constitutional unity of the British Empire must now be held to rest, and of the chief results to which these principles lead. Such a sketch may be briefly made, and the present author is content to make it by a compilation of opinions from the learned writers who have discussed the subject in recent years.

In the definition of the Dominions contained in the Report of 1926 the following words occur :

*'They are autonomous communities within the British Empire, equal in status, . . . united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'*<sup>1</sup>

There is here an assertion of the unity of the Dominions with the Mother Country in the Empire, and an indication of the two chief factors by which, in the opinion of the Balfour Committee, that unity is maintained: *common allegiance* to the Crown, and *free association* as Members of the Commonwealth. These two factors are the expression of two aspects, the legal aspect and the political aspect, of the constitutional relation between the Members of the Commonwealth. The two go together, they cannot be separated, for they supplement and complete each other to form a bond of union which, both in constitutional law and in political life, is strong and real. It will be useful to begin an examination of these factors and of their results by recalling

<sup>1</sup> Cmd. 2768 (1926), p. 14. (Original italics.)

how the present constitutional relation of the Members of the British Commonwealth arose.

The present self-governing Dominions began life as Crown Colonies. While they were in that condition, they were precisely what their title indicated: they belonged to the Crown, they were parts of the single and united realm of a single King. This was the fundamental fact about their status and government; and it was the source of the constitutional arrangements by which they were ruled. The executive functions of government were, in the Crown Colonies as in the United Kingdom, the prerogative of the King; the legislative functions were performed by the 'King in Parliament'—that is to say, in his Parliament at Westminster.

It is from this condition, from this constitutional status, that the Dominions have gradually emerged by the historical process which has been described above. In its essential legal principles, the constitution of the British Empire has not altered since the days when they were Crown Colonies. The fundamental fact about the legal position of the Dominions in the Empire is still that they are parts of the single realm of a single King, that they are under one Crown. That fact still leads to the same results in respect of the executive and legislative functions of government. Thus Professor Smith writes:

'The formal structure of the British Empire is the expression of two fundamental principles of our constitutional law—the principle of the executive prerogative of the Crown, and the principle of the supremacy of the Imperial Parliament.'<sup>1</sup>

But of course these principles operate to-day in the government of the Dominions quite differently from the way in which they used to operate when the

<sup>1</sup> *Canada and World Politics, Laws, and Administration of the* p. 25. *Vide also Keith, Constitution, Empire, chap. ii.*

Dominions were Crown Colonies. The executive functions are still the prerogative of the King; but a great part of the prerogative is delegated to his principal representative in each Dominion, the Governor-General, and both the Governor-General and the King himself fulfil their duties in accordance with the advice of ministers who are responsible to the Dominion Parliament. Similarly, the operation of the principle of the supremacy of the legislation of the King in his Parliament at Westminster has been modified in ways which will be sketched later, and to such an extent that the word 'supremacy' now has a wholly different meaning from that which it used to have. But legally in its essential constitutional structure the Empire remains what it used to be. Let us look more closely at the facts about this structure which were mentioned above and at the constitutional results to which they lead.

#### THE POSITION OF THE CROWN.

The King of England is the titular Head of the British Empire, and therefore of all the various autonomous units which the British Empire now includes. The most essential fact about his position is the unity of his realm. 'The unity of the Crown,' said Mr. Amery, the Secretary of State for the Dominions, in a speech made in November 1926, 'is a cardinal point . . . in the constitution of the British Empire.' And he went on:

'The Crown in the British Empire is one and undivided. There was a time not so long ago when the King of England was also King of Hanover, but he was King in two different capacities, the wearer of two different crowns, and indeed the holder of crowns having different laws of succession; and so the time came when the two crowns separated. There is no such division within the British Empire. The King is not King of Great

Britain in one capacity, King of Australia in another. He is King in the same sense, *and as wearer of the same crown*, of the whole Empire.' <sup>1</sup>

The King, in other words, is exactly what, as the result of the latest legislation on the subject, the Royal and Parliamentary Titles Act of 1927, his proper statutory title describes him to be : 'George V., by the grace of God, of Great Britain, Ireland, and the British Dominions beyond the seas, King, Defender of the Faith, Emperor of India.' <sup>2</sup>

Another aspect of his position was well described by the present Prince of Wales in a speech which he made in London on his return from a visit to Canada some years ago :

'The King,' he said, 'as the constitutional sovereign of the Empire, occupies exactly the same position in Canada and in the whole British Empire [? for Empire read Commonwealth] as he does in Great Britain, and his house, although originally founded in Great Britain, belongs equally to all the other nations of the Commonwealth.' <sup>3</sup>

This position of the King is, as Mr. Amery said, of supreme constitutional importance in the British Commonwealth. In the final message of 'fidelity and devotion' addressed by the Imperial Conference of 1926 to 'His Majesty the King, Emperor of India,' the following words occur :

*'The foundation of our work has been the sure knowledge that to each of us, as to all Your Majesty's subjects, the Crown is the abiding symbol and emblem of the unity of the British Commonwealth of Nations.'* <sup>4</sup>

<sup>1</sup> *Journal of the R.I.I.A.*, January 1927, pp. 15-61.

<sup>2</sup> Cmd. 2768 (1926), p. 16; Royal and Parliamentary Titles Act, 1927, Public General Acts and Measures,

17 & 18 George V., 1927, chap. 4, p. 5.

<sup>3</sup> *The Times*, December 19, 1919. Cited by Duncan Hall, *British Commonwealth of Nations*, p. 240.

<sup>4</sup> Cmd. 2768 (1926), p. 60.

This message was not merely formal, because no one who knows the political working of British institutions doubts that as 'a symbol and emblem of unity' the Crown is most important. But it has greater constitutional importance than that of a symbol. It is an indispensable institution in the existing constitutional arrangements that hold the Commonwealth together. If the Crown were destroyed, if the institution of the British monarchy were abolished, it is at least doubtful whether the Commonwealth would not immediately break up. No-one has put the point with greater force than General Smuts himself :

'You cannot,' he said, 'make a Republic of the British Commonwealth of Nations, because if you have to elect a President not only in these islands, but all over the British Empire, who will be the ruler and representative of all these peoples, you are facing an absolutely insoluble problem.'<sup>1</sup> On this ground he declared that the Crown was comparable with the Imperial Conference itself as one of the two most potent bonds of union. Moreover, there is no doubt that politically as well as constitutionally General Smuts was right. Loyalty to the person of the King and to the tradition of his Royal House is a powerful factor in the political outlook of the Dominion peoples.<sup>2</sup>

The fact that all the Members of the British Commonwealth acknowledge the common lordship of the King of England has various important constitutional results. These results may be briefly dealt with one by one.

<sup>1</sup> May 15, 1917, cited by Hall, *British Commonwealth of Nations*, p. 239.

<sup>2</sup> 'The value of this tie is immeasurably increased by the fact that the Crown is not an abstraction

but is manifested in the personality of the Sovereign. It is almost impossible to exaggerate the importance of the personal element as a factor of cohesion within the Empire.' Keith, *Constitution, Administration, and Laws of the Empire*, p. 12.

## COMMON ALLEGIANCE.

There can be no doubt that the most important single fact that differentiates the relationships of the Members of the British Commonwealth from those of independent foreign states is the fact of the common allegiance of their citizens to the British Crown, of which the Balfour Committee speak in their definition. It is a fact which affects profoundly the whole internal constitutional arrangements of every Member of the Commonwealth, and which still dominates their international position. To quote Mr. Amery again :

‘As subjects of the King they all owe to their Sovereign the same loyalty and allegiance, and through that owe each other a corresponding mutual loyalty and a mutual obligation. That underlying element which binds every individual British subject to every other is the material on which the foundation of each Government of our Empire is laid. Each subject of these Governments is one of His Majesty’s subjects, and each Government is one of the Governments of the King ; the ministers who compose it are His Majesty’s ministers, and the Parliament in which they sit is a Parliament representing communities of His Majesty’s subjects. This is a fact which has a tremendous unifying influence.’<sup>1</sup>

It is unnecessary to add much to Mr. Amery’s statement of the constitutional importance of the fact of common allegiance. It may be repeated once more that what matters most about it is its unity. A Canadian critic of the Report of 1926 has asked, in the course of a valuable paper, whether the Balfour Committee should not have spoken of an ‘allegiance to a common Crown,’ rather than of a ‘common allegiance to the Crown.’<sup>2</sup> It would seem that the proper answer to

<sup>1</sup> *J.R.I.I.A.*, January 1927, p. 16.

<sup>2</sup> Lavoie, *Revue Générale de Droit*

*International Public*, March - April 1927, p. 201.

this question is that repetition alone is wholly accurate: the allegiance of the peoples of the Dominions is a common allegiance to a common Crown. A common Crown they certainly have, as Lavoie suggests: the King has not a wardrobe full of crowns, but only one. But their allegiance to that Crown is common also. The allegiance of the Englishman, the Canadian, and the Australian does not differ in any particular whatever; it is identically the same in historical origin, in legal nature, and in political effect. Nor are there, so to speak, a series of separate allegiances, identical in effect and nature, but constituting distinct legal obligations for each Dominion. On the contrary, the allegiance of the citizens of the Dominions is one and undivided, a common fabric that embraces all.

#### COMMON NATIONALITY.

Another consequence of the fact that the Dominions are all ruled by a common King, and one closely connected with their common allegiance, is that their citizens have in British constitutional law and in International Law a common nationality.

To quote Mr. Amery again:

‘And from that [the common authority of a single King] follows one vitally important aspect of the whole Constitution, namely, that whatever may be the forms of government, there runs through the whole Empire the common status, the common nationality, of a subject of the King. There are different conditions of citizenship in the different parts of the Empire, but all the King’s subjects are fellow-subjects, they are not aliens one to the other in any part of the Empire.’<sup>1</sup>

There is no need to discuss in detail the legislation of the British and Dominion Parliaments which regulates this common nationality, for it has been adequately

<sup>1</sup> *J.R.I.I.A.*, January 1927, p. 16.

dealt with in the standard books.<sup>1</sup> It is enough to state briefly its guiding principles.

The first and fundamental rule is that every person born anywhere within the territories of the British Commonwealth is a natural-born British subject, whatever his ancestry may be. Birth anywhere on a British ship confers the same status. Likewise the child of a British father is a natural-born British subject, even if he or she be born outside the British Dominions, provided that the father was born on territory over which the Crown exercised territorial jurisdiction. Even the grandson of a British subject, though both he and his father be born abroad, may have the option of British citizenship when he attains the age of twenty-one.

Second, British nationality may be acquired by naturalisation. Naturalisation may be either 'local' or 'Imperial.' Imperial naturalisation, acquired only after certain general conditions have been fulfilled, can be obtained in any part of the Commonwealth except New Zealand and the Irish Free State,<sup>2</sup> and confers upon the person acquiring it the full status of a natural-born British subject throughout the Empire.

British nationality, whether acquired by birth or by 'Imperial' naturalisation, secures to the British subject the protection of the British embassies and legations in foreign states, the right of free entry into Great Britain, and full political rights in Great Britain.

Third, 'local' naturalisation can be granted by the

<sup>1</sup> Keith, *Imperial Unity and the Dominions*, part i. chap. xii.; *Constitution, Administration, and Laws of the Empire*, chap. iii.; *Responsible Government*, 1928 ed., part v. chap. xiii. *Vide* also Toynbee, *op. cit.*, pp. 44-5; Oppenheim, *International Law*, 4th ed., i. pp. 524-41.

<sup>2</sup> This 'Imperial' naturalisation was made legal by the British Nationality and Status of Aliens Act, 1914. This Act provided that

Dominion Parliaments might bring its provisions into effect by their own legislation for their respective territories. The New Zealand and the Free State Parliaments have never done so, but a bill assimilating the law of nationality to that of Great Britain was introduced into the New Zealand Parliament in 1928. *Times*, September 7, 1928. *Vide* Oppenheim, *International Law*, 4th ed., i. p. 541.

Government of a Dominion on special conditions which that Government itself determines; but it has no effect beyond the territorial limits of that Dominion, except that of securing the protection of British diplomatic missions in foreign lands.<sup>1</sup>

Fourth, in addition to the 'nationality shared in common by all the subjects of the King, whatever the part of his Dominions to which they belong,'<sup>2</sup> there is another kind of nationality or citizenship which is confined to the different Dominions, and not shared by those in other parts of the British Commonwealth. Thus Canada in 1911 and again in 1921 passed legislation defining who are Canadian 'nationals.' The whole point of the Act of 1921,<sup>3</sup> which related to the eligibility of persons for nomination for membership of the Permanent Court of International Justice, was to exclude ordinary British subjects in other parts of the British Commonwealth from enjoying the privileges of Canadian citizenship in this respect.

For the most part, Dominion Parliaments have only admitted to their 'citizenship' those who would also qualify for British nationality. This, however, has not been by any means an invariable rule; by varying the conditions of 'local naturalisation' considerable exceptions have been made, while the constitution of the Irish Free State confers citizenship and political rights on persons who are not British subjects save within the limits of the Free State, and refuses them to British subjects who have not resided there for a minimum period of seven years.

Fifth, there are some grounds for a tentative suggestion

<sup>1</sup> Cf. Oppenheim, *International Law*, 4th ed., i. p. 542: 'In so far as certificates fail to confer naturalisation which is imperial in scope, their operation is local and is confined to the part of the British Empire which granted it and those other parts which recognise it; never-

theless, as has already been stated, *for all international purposes* the holder of such a certificate has British nationality and will receive British diplomatic protection.' (My italics.)

<sup>2</sup> Cf. *ibid.*, p. 526.

<sup>3</sup> Canadian Nationals Definition Act, 1921.

that Dominion nationality is for League of Nations purposes different from British nationality. It is too early as yet, however, to say anything specific on the point.<sup>1</sup>

Lastly, it must be mentioned that the Imperial Conference of 1926 adopted a Report in which they declared that they 'attached great importance to the maintenance of uniformity throughout the various parts of the Empire in the law relating to British nationality';<sup>2</sup> and that it is a working rule of constitutional practice—though the rule is not invariably observed—that no change shall be made in the existing law except after agreement to which all the Governments of the British Commonwealth are parties.

It is plain from this brief review that there are divergencies in the law of nationality and its effect in different units of the Commonwealth, and that the Dominion Parliaments have not always lived up in their legislative action to the resolutions which their Governments have adopted in the Imperial Conference. But it is also plain that, broadly speaking, the inhabitants of Great Britain and the Dominions have both in British Law and in International Law a common nationality. 'English law,' says Keith, 'still refuses to accept the existence of any distinction in British nationality, at any rate of a kind comparable to distinct nationalities within the Empire.'<sup>3</sup>

It is difficult to overestimate the importance of this fact of common nationality as a constitutional link between the various Members of the British Commonwealth. What it means may be repeated in the words of Duncan Hall:

'By common citizenship,' he says, 'is meant the fundamentally important fact that no subject of His Majesty the King can be an alien in any part of the British

<sup>1</sup> Cf. pp. 102, 104, and 129, *supra*.

<sup>2</sup> Cmd. 2768 (1926), p. 39.

<sup>3</sup> *Constitution, Administration, and Laws of the Empire*, p. 61.

Empire. It is true that his right to move from one part to another part of the British Empire is subject to local immigration laws. But . . . this limitation is negligible. The practical fact is that a citizen of Great Britain and of the Dominions can move to any part of the British Empire without being subject to any of the disabilities of alienage and without being deprived of the exercise of any of his franchises except in a part where such franchises have not yet been established for the inhabitants of that part.' <sup>1</sup>

And he adds:

'Though ultimately derived from the existence of a common Crown, "common citizenship" is a bond of Empire of immensely more significance than the mere existence of a common Crown — one of such great practical value that its abandonment is hardly thinkable. Yet it is a bond that is so much taken for granted both inside and outside the British Commonwealth that its real nature is scarcely realised. Rightly regarded, it is one of the most significant institutions of our time.' <sup>2</sup>

#### THE CROWN AS THE SUPREME EXECUTIVE THROUGHOUT THE BRITISH COMMONWEALTH.

'The Crown is the supreme Executive in the United Kingdom and all the Dominions,' wrote the Dominion Prime Ministers in their memorandum of March 12, 1919. What this means in practice is thus explained by Keith:

'It is a fundamental principle of the government of the United Kingdom,' he says, 'that the whole executive authority of the kingdom rests in the hands of the Crown, that this authority is exercised in every case on the advice of Ministers, and that for every act of the King which is done in his official capacity a Minister of the Crown must be responsible.' <sup>3</sup>

<sup>1</sup> Lowell and Hall, 1927, p. 617.

<sup>2</sup> *Ibid.*, pp. 617-18.

<sup>3</sup> *Imperial Unity and the Dominions*, p. 35.

As has been said above, the same fundamental principle applies equally in the government of the Dominions. But there 'it is recognised,' says Keith, 'that while the executive government must be vested in the Crown, nevertheless it cannot normally be exercised by the Sovereign in person, and must be carried on by a representative, styled Governor-General in the case of Federations and Governor in the case of unitary Dominions.'<sup>1</sup> The Governor-General or Governor is the acting head of the Executive on the spot, the personal representative of the King, holding on his behalf broadly the same position in the constitutional system of a Dominion that the King himself holds in the constitutional system of Great Britain. He is nominated by the King on the advice of the British Cabinet, the Secretary of State for the Dominions being the Minister responsible to the British House of Commons for the appointment.

One or two points in connection with the position of the Governor-General may be briefly dealt with.

It is sometimes said that the appointment of Governors-General by the King on the advice of his British Ministers is a proof of the inequality of the constitutional status of the Dominions, that it is proof of their subordination. In a work written by Keith in 1916 the following headings appear :

## 'PART I. THE LIMITATIONS OF THE AUTONOMY OF THE DOMINIONS

### A. THE GOVERNOR

#### CHAPTER I

##### THE APPOINTMENT OF THE GOVERNOR'<sup>2</sup>

These headings gave a perfectly accurate idea of the constitutional significance of the institution of Governors-

<sup>1</sup> *Imperial Unity and the Dominions*, p. 26.

<sup>2</sup> *Ibid.*

General in the Dominions at the time that work was written, a dozen years ago. They would hardly give so accurate an idea at the present day.

In the first place, Governors-General of Dominions are no longer appointed solely on the advice of British Ministers. On the contrary, it is now a constitutional convention that the Ministers of the Dominion concerned shall be consulted also before the appointment of a Governor is made. It is even said that on a recent occasion, when a list of candidates was submitted to the Canadian Government by the British Secretary of State, the Canadian Government rejected the whole list and put forward a nomination of its own which was accepted. If that is true, it means that on that occasion at least the King's representative in a Dominion was in reality chosen on the advice not of British but of Dominion Ministers. It may well be that this precedent, if it is a precedent, will in time harden into a new constitutional convention of the governmental system of the Commonwealth.

Second, quite apart from the method of his appointment, the position of the Governor-General of a Dominion in the system of the Commonwealth has been radically changed by the Imperial Conference Report of 1926. Until then the Governor-General had been in theory, and to a certain though restricted extent in practice, the representative in his Dominion of the British Government. This he is to be no longer. 'In our opinion,' said the Committee of the Imperial Conference, 'it is an essential consequence of the equality of status existing among the Members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain,

and that he is not the representative or agent of His Majesty's Government in Great Britain, or of any department of that Government.'<sup>1</sup> As a practical result of the change in the Governor-General's position it was agreed that he should no longer be the channel for communication between the British Government and the Government of his Dominion, but that 'communication should be in future between Government and Government direct.'<sup>2</sup> In fact, some of the secretariats previously maintained by the Governors-General for maintaining such communication were already abolished in 1927.<sup>3</sup>

It is difficult, in face of this language used by the Balfour Committee, to hold any longer that the existence of the institution of Governor-General is a 'limitation of the autonomy of the Dominions.' But the fact that the existence of the institution of Governor-General no longer implies any subordination on the part of the Dominions does not in any way diminish the importance of that institution as a constitutional link between the Members of the British Commonwealth.

There is another point in connection with royal prerogative that must be mentioned: it is that the prerogative is particularly important in connection with the international rights of the Dominions which it is

<sup>1</sup> Cmd. 2768 (1926), p. 16. (My italics.)

<sup>2</sup> Cf. Smith, *op. cit.*, p. 39: 'It is agreed that in all the Dominions which are separate Members of the League of Nations, the Governor-General must act only as a constitutional sovereign.' But as recently as 1924 Keith had written (*Constitution, Laws, and Administration*, p. 18): 'In the Dominions the Governor owes obedience to the Imperial Parliament and has no responsibility to the local Parliament.'

Cf. an interesting declaration made by Poulett-Thomson (afterwards Lord Sydenham), Lord Durham's successor

as Governor of Canada in 1839: 'I have told the people plainly that, as I cannot get rid of my responsibility to the Home Government, I will place no responsibility on the Council; that they are a *Council* for the Governor to consult, but no more. Either the Governor is the Sovereign or the Minister. If the first, he may have Ministers, but he cannot be responsible to the Government at home, and all colonial government becomes impossible.' Cited by Egerton, *British Colonial Policy*, p. 305.

\* In Canada, South Africa, and the Irish Free State.

the purpose of this book to study. In foreign as in domestic affairs the King is the Head of the Dominion Governments. With him, acting on the advice of his Ministers, lie 'the legal powers necessary for formal action in respect of the relations of the Empire or its component parts with foreign states.'<sup>1</sup> Thus no Dominion can undertake any negotiation, conclude any treaty, appoint any Minister or delegate abroad, without the exercise of the sovereign prerogative of the Crown in the grant of full powers, instruments of ratification, and so on. And it so happens that in respect of foreign affairs the King has not delegated his prerogative authority and powers to the Governors-General of Dominions, as he has done in respect of domestic matters. In the domestic government of the Dominions the Governor-General is effectively the source of executive authority; with his formal approval and consent the Dominion Ministers carry on the work of their day-to-day administration. With some exceptions, which will be mentioned shortly, he has authority to act for the King; his signature is sufficient to validate the acts of his Dominion Ministers and Parliaments. But in foreign affairs the Governor-General has no such rights or powers. The King has delegated to him no authority of any kind at all. The time may come when this will happen; it may even be at hand;<sup>2</sup> and it is difficult to see that such a devolution of authority to the Governors-General would necessarily 'involve the formal disruption of the Empire into a number of sovereign states, which would be separate units in International Law,'<sup>3</sup> as Duncan

<sup>1</sup> Duncan Hall, *Journal of Comparative Legislation*, October 1920, pp. 200-1.

<sup>2</sup> The signature of certain treaties without special full powers signed by the King, their ratification by Dominion Orders in Council, and the

appointment of Assembly delegations by Dominion Governments, discussed above, may prove to be the beginning of the change; cf. *supra*, pp. 86, 179-82, 199, 208.

<sup>3</sup> *Journal of Comparative Legislation*, October 1920, p. 201.

Hall suggests it would. Mr. Mackenzie King has virtually explained why it would not mean such disruption, in the speech cited in Chapter V. above.<sup>1</sup> He has explained that the Dominion Governments still give their advice to the King on international questions through the intermediary of a British Minister, not because there is any special limitation in this respect on their autonomy, but merely because at the present stage of constitutional evolution it is practically convenient for all such advice to pass through a common channel. But it is plain that the same practical advantages could in theory be secured by the establishment, on an inter-Dominion basis, of a permanent Commonwealth Secretariat, to replace that which the British Dominions' Office now provides. This would enable the King to devolve authority on the Governors-General without confusion of policy being the result. The change, therefore, may some day happen, and will bring no revolutionary consequence if it does. But it has not yet happened; as a result there is, in respect of those executive functions which relate to foreign affairs, in a very special sense, a concentration of executive authority with the Crown. This concentration means that in their international relations the Dominions cannot act not merely without the formal or 'secretarial' intervention of a British Minister, but also without the personal intervention of the King.<sup>2</sup> It is evident that this fact makes the position of the Crown as the supreme executive throughout the British Commonwealth a particularly important constitutional link, in relation to the international status of its Members.

<sup>1</sup> *Vide supra*, pp. 195 and 199.

<sup>2</sup> On a full power or on an instru-

ment of ratification the only signature is that of the King himself.

# THE RETENTION OF CERTAIN PREROGATIVE FUNCTIONS OF THE CROWN.

There are also other prerogative functions of the Crown which, like the functions relating to intercourse with foreign Powers, have not been delegated to the Governors-General of the Dominions. In 1916 Professor Keith wrote thus :

‘ It is now clear that the Governor has a delegation of so much of the royal prerogative as is required for the conduct of the executive government of the Dominion . . . of which he is Governor, and time and good sense have united to make it clear that this necessary delegation includes practically all the prerogatives of the Crown in the United Kingdom.

‘ There are; however, certain powers which are *not* to pass without special delegation.’ <sup>1</sup>

The powers which do not pass, and which are therefore exercised by no Governor-General or Governor of a Dominion, are, he said, as follows :

1. The right to declare war and to make peace.
2. The right to annex territory to the Dominion, without special express authority to do so.
3. The grant of titles and honours of various kinds.
4. The prerogative of mercy, *i.e.* of pardoning or of curtailing or mitigating the punishment of condemned criminals. (This is exercised in part only by Governors-General.)
5. The power to appoint a Deputy Governor-General to take his place when he is absent for any reason from his post.<sup>2</sup>

Nothing has been done since 1916 to bring about the delegation of these rights and powers to the Governors-General. Their position in respect of all these matters

<sup>1</sup> *Imperial Unity and the Dominions*, pp. 52-3.

<sup>2</sup> *Vide op. cit.*, part i. chap. iii., for a very valuable and learned discussion of these points.

is precisely what it was then. It is not certain, however, that this means that the effective exercise of the prerogative in these matters remains in the hands of the King acting on the advice of his British Ministers. That was, without question, the situation in 1916; it was for that reason that—rightly—Keith discussed this ‘limitation of the prerogative’ among the ‘limitations of the autonomy of the Dominions.’ It involved a definite subordination to the authority of the British Government; but it is not certain that the situation is the same to-day. It may well be held that this limitation of Dominion autonomy, this subordination, has been abolished by the Report of 1926. Without doubt the general principles of the Report discussed in the last chapter would bear such an application to the last three of Professor Keith’s exceptions, the grant of honours, mercy, and the appointment of a deputy. The abolition of subordination does not necessarily mean delegation of these rights and powers to the Governors-General; it may merely mean their exercise by the King in the same way as his prerogative is exercised in the grant of full powers above discussed—that is to say, with the formal assistance of a British Minister, but on the effective advice of the Dominion Government. Indeed, in view of the plain terms of the Report, it can hardly be doubted that in future these rights will be so exercised, with the result that the Dominions will no longer be under any ‘disabilities’ in respect of the three matters mentioned.

The same would appear to be true of the far more important rights, the rights to declare war, to make peace, and to annex territory, which were previously retained by the King acting on the advice of his British Ministers. These rights, in fact, involve some of the theoretically most difficult points in Commonwealth relations at the present day. In some of their aspects they will be

discussed in the next chapter of this book. For the moment, it must be said that while, of course, there has been no delegation of powers in these vitally important matters to the Governors-General, it may still be held that, if the Report of 1926 is to be given a rational meaning, the Dominion Governments must have effective equality of rights with the British Government even with regard to war or peace or annexation. This would mean that Dominion Governments must have the right, equally with the British Government, to advise the King on these matters; but of course their exercise of the right would be subject, first, to the conventional duty of 'consultation,'<sup>1</sup> and, secondly, to the further convention regarding 'group' questions, which must be discussed in Chapter VII.<sup>2</sup>

If these conclusions are correct, it follows that the non-delegation of certain prerogatives of the Crown by the King to his Governors-General has no longer the meaning which it used to have. It no longer involves subordination of the Dominions.

But it is still an element, and an important element, both in the formal legal structure of the British Empire and in the living constitutional relationship that exists between the different autonomous Governments of the British Commonwealth.

#### COMMON BELLIGERENCY.

Connected with the prerogative rights of the King to make war and to declare peace is the fact that, when any one Member of the British Commonwealth is at war, all the other Members are equally at war. This again is a direct result of the fact that the Members of the Commonwealth all owe allegiance to a common Crown, that their territories are all parts of the single realm of a single monarch.

<sup>1</sup> Cf. *supra*, pp. 165 *et seqq.*

<sup>2</sup> Cf. *infra*, pp. 268 *et seqq.*

'There is the fact,' said Mr. Amery in the speech referred to above, 'that in war no subject of the King can be a friend of the King's enemies, or, in other words, neutral in the strict sense of the word. . . . From the point of view of the common law of our Constitution, as from the point of view of International Law without, the King's subjects, when the King is at war, are in the same general relationship to him as the King's enemies.'<sup>1</sup>

All constitutional authorities are in fact agreed that this is true;<sup>2</sup> and this fact of common belligerency is another vitally important element in the constitutional relationship between the Members of the British Commonwealth.

#### RIGHT OF APPEAL TO THE JUDICIAL COMMITTEE OF THE BRITISH PRIVY COUNCIL.

Another result of the fact that the royal prerogative of the King runs throughout the British Commonwealth is the right of appeal from Dominion courts of law to the Judicial Committee of the Privy Council in London.

Thus H. A. Smith has written :

'The right of appeal from Dominion and Colonial courts to the Judicial Committee of the Privy Council is an important, though not an essential, element in the legal structure of the Empire. Technically, it forms a part of the royal prerogative, resting upon the mediæval theory that there is an ultimate reserve of justice vested in the King which enables him to correct the errors of the courts of law. In another form this theory of the royal prerogative was the historical foundation of the Court of Chancery and the rules of "equity" in English jurisprudence.'<sup>3</sup>

<sup>1</sup> *Loc. cit.*, p. 17.

<sup>2</sup> 'There is absolutely no basis, either constitutionally or internationally, for the contention that Canada can be at war while Great Britain is at peace.' Smith and

Corbett, *Canada and World Politics*, p. 95. For a further discussion of the difficulties involved and a further citation of authorities, *vide infra*, pp. 330 *et seqq.*

<sup>3</sup> *Canada and World Politics*, p. 33.

The Judicial Committee has the right to admit appeals from any court in the Dominions, whether it be a court of error or not. The right to appeal has been in fact virtually abolished in criminal cases by the refusal of the Judicial Committee to admit it; it is restricted in some degree by certain Dominion statutes;<sup>1</sup> but in civil cases it still survives, and in fact is largely used. It dates, of course, from the time when all the King's courts throughout the Empire were part of a single system, and when it was desired through the right of appeal to one supreme tribunal to maintain the uniformity in all the King's Dominions of the English common law.

That object it can no longer achieve, as Keith has pointed out.<sup>2</sup> But it is claimed that 'the duties of the Privy Council are of importance in preserving uniformity of law as to the prerogatives of the Crown, and in maintaining the overriding force of Imperial statutes.'<sup>3</sup> Again, in view of the decisions of the Imperial Conference of 1926 discussed above, this language, in form at least, appears to be a little out of date. There is, moreover, a considerable movement in certain Dominions, chief among them Canada and the Irish Free State, for the total abolition of the right of appeal, and it is important that the Imperial Conference noted that 'it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected.'<sup>4</sup> Sir Robert Borden interpreted this to mean that 'questions affect-

<sup>1</sup> *E.g.*, under the Australian constitution the interpretation of the constitution is reserved to the Australian High Court of Appeal.

<sup>2</sup> 'The English common law is so far from alive in most parts of the Empire . . . that the function of

the Privy Council in maintaining uniformity of law is not to be taken very seriously.' *Imperial Unity and the Dominions*, p. 379.

<sup>3</sup> Lewis, *B. Y. I. L.*, 1922-3, p. 23.

<sup>4</sup> Cmd. 2768 (1926), p. 19.

ing judicial appeals are to be determined in accordance with the wishes of the Dominions primarily affected.'<sup>1</sup> Nevertheless, abolition of the right of appeal was not agreed to in 1926; on the contrary, it was agreed that any such change ought only to be carried out in respect of any single Dominion after general consultation and discussion. The Irish Free State, however, in 1928 set a new precedent by refusing to recognise a verdict (in the so-called Wigg-Cochrane case) by the Judicial Committee which reversed a judgment of the Free State Supreme Court.<sup>2</sup> What general effect, if any, this precedent will have, remains to be seen. Subject to this general effect, it is necessary to say that the right of appeal to London still remains, and is again an important element, though, as Smith says, not an essential element, in the constitutional relationship between the different communities of which the British Commonwealth is composed.

It is often said that the Privy Council provides an admirable tribunal for the trial of disputes between Dominion Governments, or between a Dominion and the British Government, if such should happen to arise. It has in fact sometimes been used for this purpose,<sup>3</sup> but not very often. Were it to be recognised as the 'International' Court of the Commonwealth for Government disputes of every kind, it would become another important element in the relationship now being discussed.

<sup>1</sup> *Journal of the R.I.I.A.*, July 1927, p. 205.

<sup>2</sup> Vide *Times*, Feb. 21, 1929. The Irish Minister of Finance observed that 'the opinion of the Free State Government concerning the Judicial Committee had changed in no respect since it was enunciated in Dail

Eireann some years ago by the late Mr. Kevin O'Higgins.'

Mr. O'Higgins' views were expressed by the phrase: 'A bad, unnecessary, and useless Court.'

<sup>3</sup> *E.g.*, in 1927 for the Labrador Boundary dispute between Newfoundland and the Province of Quebec.

THE SUPREMACY OF THE LEGISLATION OF THE BRITISH  
PARLIAMENT THROUGHOUT THE COMMONWEALTH,  
AND OTHER SIMILAR POINTS.

Such being the constitutional connections between the different Members of the British Commonwealth resulting from their common allegiance to a common Crown, and from the universal constitutional authority of the King's prerogative, it remains to be considered what is the connection that results from the legislative supremacy of the King in Parliament.

'The foundation of the constitution of the Empire lies in the doctrine of the absolute validity throughout the Empire of any legislation by the Imperial Parliament whatever its subject-matter. There is no such thing as an illegal act of the Imperial Parliament . . . ; its edicts must be enforced in every court of law throughout the British Dominions, . . . so far as they are made expressly applicable to those territories.'<sup>1</sup>

So wrote Keith in 1924. His statement is an unequivocal enunciation of the supremacy of the Parliament of Westminster, and a declaration that this supremacy 'is the foundation of the constitution of the Empire.'

Keith's words, however, are not a full statement of the present constitutional position with regard to legislation, even as it stood in 1924. In other parts of the work from which they have been taken, he gave many supplementary explanations which threw a different light on various points; and since he wrote them, the Report of 1926 has still further altered the position. It will be useful to attempt a brief summary of the present constitutional doctrine and practice with regard to legislation, so far as it has been settled.

Prior to 1914 the Dominion Parliaments had not

<sup>1</sup> *Constitution, Administration, and Laws of the Empire*, p. 16.

equal legislative rights with the British Parliament. On the contrary, they were subject to limitations of several kinds.

First, there was the legislative supremacy of the British Parliament, of which Keith speaks. This was originally, in his words, the 'foundation of the constitution of the Empire'; it was definitely confirmed by the Colonial Laws Validity Act of 1865, under which Act the British Parliament could pass legislation applicable to any part of the Empire, if it desired to do so, while Dominion legislation incompatible with previously existing British legislation was declared *ipso facto* null and void. Moreover, quite apart from the Colonial Laws Validity Act, British legislation was actually necessary for certain purposes even within the Dominions themselves. Thus the Canadian colonies in 1867 and the Australian colonies in 1900 could only federate by means of an 'Imperial' Act; the South African constitution in 1909, and even the constitution of the Irish Free State in 1922, only became law by a similar process. When in 1921 the League of Nations mandate system was applied to Samoa, the governmental institutions were established not by New Zealand legislation but by a British Order in Council drawn up in virtue of the Imperial Foreign Jurisdiction Act of 1890. Thus the legal supremacy of British legislation retained practical and constitutional reality even after the Dominions had begun to change their status as the result of their participation in the World War.

Second, Dominion Parliaments could not, generally speaking, pass legislation with extra-territorial effect. Their power was restricted to their own territorial limits, with the result that on many subjects the Imperial Parliament at Westminster was obliged to come to the aid of the Dominion and Colonial Legislatures. This happened, for example, with regard to extradition,

foreign enlistment, merchant shipping, copyright, bankruptcy, and naturalisation.

Third, in certain subjects some of them were without powers of legislation at all; under their constitutions certain matters were reserved with which they could not deal. The most important of the limitations of this class is that by which under the British North America Act of 1867 the Canadian Parliament has no right to amend the Canadian constitution in any way. If amendment should be required—and important amendments, such as the abolition of the Senate, have often been discussed—it would have to be done by an Act of the British Parliament.<sup>1</sup>

Fourth, under the practice in force until 1926 every Act of a Dominion Parliament was sent to London, and it was intimated to the Dominion Government through the Secretary of State for Dominion Affairs that 'His Majesty will not be advised to exercise his powers of disallowance' with regard to them.<sup>2</sup> In addition to this general legal power of the King to refuse consent on the advice of his British Ministers, there are also provisions in some Dominion constitutions which call for special 'reservation' of certain kinds of Dominion legislation.

These legal disabilities of the Dominion Parliaments in respect of legislation have now been modified, and in part at least removed, by certain constitutional conventions which have been codified in the Report of 1926.

Thus with regard to the supremacy of Imperial legislation, the Imperial Conference decided that '*it should*

<sup>1</sup> Cf. Keith, *Responsible Government*, 1923 ed., ii. pp. 1146-7: 'No Dominion has any vital power of constitutional change. . . . They [the Dominions] cannot enlarge their powers by any act of their own, they cannot alter their status. . . . Their

dependency is revealed not merely by this general subordination of their Constitutions to the Imperial Parliament, whence they derive their legal authority, but also in minor but very important ways.'

<sup>2</sup> Cmd. 2768 (1926), p. 17.

*be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.'*<sup>1</sup> On this declaration Smith comments: 'It is now established that the legal supremacy of Parliament should only be employed with the consent of the Dominions in order to enact legislation which the Dominions are unable to enact for themselves.'<sup>2</sup>

Similarly, with regard to disallowance and reservation of Dominion Bills, the Conference decided that 'it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, *it would not be in accordance with constitutional practice* for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.'<sup>3</sup> In other words, the power of disallowance, which was previously obsolescent, is now obsolete. Certain exceptions, however, are still provisionally made: the recognition of the rights of the Dominion Governments is granted 'apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation.'

Further, these remaining exceptions, together with the question of conferring on Dominion Parliaments the power to give their legislation extra-territorial effect, and the question of amending or repealing the Colonial Laws Validity Act of 1865, were referred by the Imperial Conference of 1926 to a special Expert Committee for consideration and report to the next meeting of the Conference. A similar course was

<sup>1</sup> Cmd. 2768 (1926), p. 18. (My italics.)

<sup>2</sup> *Canada and World Politics*, p. 31.

<sup>3</sup> Cmd. 2768 (1926), p. 17. (My italics.)

pursued with regard to merchant-shipping legislation, in which grave inequalities between Great Britain and the Dominions still subsist.

The constitutional conventions laid down in the Report of 1926 were only in the form of declarations of general principle, and were frankly no more than confirmations of practice that was already being more and more generally observed. They will be completed by the detailed measures of change and reform which the Expert Committee will propose. Those measures will certainly carry forward the work of the Report of 1926 in removing, both in substance and in form, the disabilities of the Dominions in respect of legislation. But by the Report itself the Dominions have already made a great advance towards real equality of rights in this respect. In Smith's summary phrase, 'the broad principle is accepted that Great Britain must not legislate for the Dominions against their will or without their consent, and there is to be no arbitrary interference with Dominion legislation.'<sup>1</sup>

It is plain, therefore, that there is no longer the same system of effective unitary legislative control that there used to be throughout the territories that now compose the British Commonwealth. The 'supremacy' of the Imperial Parliament has no longer the meaning it used to have. But it is to be noted that, in Smith's words, 'the power of the Imperial Parliament to legislate for the Dominions is carefully preserved.'<sup>2</sup> It was definitely contemplated by the authors of the Report of 1926 that in sundry matters it should be the regular procedure that new legislation should be made legally effective for the Dominions by means of Acts passed by the Imperial Parliament. While this continues to be true, it means that the institutions, parliamentary and other, by means of which Dominion government is

<sup>1</sup> *Op. cit.*, p. 39.

<sup>2</sup> *Ibid.*

carried on remain an integral part of a single constitutional system.<sup>1</sup>

#### CONSTITUTIONAL RELATIONS CREATED BY CONVENTION.

There is another important factor in the constitutional relationship between the Members of the Commonwealth, which is the result of the new conventions that have grown up in recent years. This is the right of every Member of the Commonwealth, first, to be informed in advance by every other Member of any international negotiations with a foreign Power that it may purpose to begin; and second, to participate in those negotiations if its Government should desire to do so.<sup>2</sup> These rights have been firmly established by the Treaty Resolution of 1923 and the Report of 1926 as part of the constitutional practice of the British Empire; and they form a link between the Members of the Commonwealth which is of obvious importance when the international status of the Dominions is being discussed. An important example of their actual exercise was furnished by the negotiations for the Kellogg Treaty for the Renunciation of War in 1928, in which the Dominions took part on their own initiative after they had been informed of the United States' proposals by the British Government.<sup>3</sup>

<sup>1</sup> On the questions discussed in this section, *vide* Keith, *Imperial Unity and the Dominions*, part i. chap. vi.; *Constitution, Administration, and Laws of the British Empire*, part i. chap. ii.; Duncan Hall, *British Commonwealth of Nations*, pp. 259 *et seqq.*; Smith and Corbett, *op. cit.*, chap. iii.

<sup>2</sup> Cf. *supra*, pp. 165 *et seqq.*

<sup>3</sup> The language of the Notes which passed on this occasion is interesting and important, e.g. the following § 13 from the British Note of May 19, 1928:

'Your Excellency will observe that the detailed arguments in the fore-

going paragraphs are expressed on behalf of His Majesty's Government in Great Britain. It will, however, be appreciated that the *proposed treaty, from its very nature, is not one which concerns His Majesty's Government in Great Britain alone, but is one in which they could not undertake to participate otherwise than jointly and simultaneously with His Majesty's Governments in the Dominions and the Government of India.* They have, therefore, been in communication with those Governments, and I am happy to be able to inform Your Excellency that as a result of the communications which have

A similar constitutional link between the Members of the Commonwealth is furnished by the conventional obligation incumbent on each of them not to do certain things in their relations with foreign Powers except by previous agreement among themselves. The most obvious example of this obligation is that no Member of the Commonwealth may make a treaty which might have the effect of imposing even indirectly obligations on the other Members unless the other Members have agreed that it shall. It covers also what are known as 'group questions'—a conventional phrase to which neither constitutional practice nor academic thinking has as yet given a wholly clear or satisfactory meaning.<sup>1</sup>

It is plain from the facts described above—the existence of a common Crown; the common duty of allegiance; common nationality; the universal validity of the royal prerogative; the exercise of the executive functions of the royal prerogative through the institution of the Governor-General; its exercise in respect of foreign relations through the formal intervention of

passed it has been ascertained that they are all in cordial agreement with the general principle of the proposed treaty. I feel confident, therefore, that on receipt of an invitation to participate in the conclusion of such a treaty they, no less than His Majesty's Government in Great Britain, will be prepared to accept the invitation.' (My italics.)

In response to this suggestion, the U.S. Government addressed invitations direct to the Governments of Canada and the Irish Free State, through the U.S.A. legations in Ottawa and Dublin, in Notes dated May 22, 1923; and addressed invitations to the Governments of the other Dominions in a Note sent to Sir A. Chamberlain on the same date. The important sentence of this Note is as follows:

'I have been instructed to extend, through you, to H.M. Governments in Australia, New Zealand, and South Africa . . . a cordial invitation, in the name of the Government of the United States, to become original parties, etc.' For these documents *vide* Wheeler-Bennett, *Information on the Renunciation of War*, pp. 119, 122 *et seqq.*

A further illustration of the constitutional point is furnished by a *communiqué* of the British Foreign Office, issued on February 16, 1929, declaring that the British Government could make no proposals concerning naval armaments before they communicated with the Dominions and received and considered their views. *Vide Times*, February 18, 1929.

<sup>1</sup> Cf. *infra*, pp. 268 *et seqq.*

the King and a British Secretary of State; the common jurisdiction of the Privy Council; the fact that if the King is at war in respect of one part of his Dominions, all the rest are automatically involved as well; the surviving 'legislative supremacy' of the Imperial Parliament; the right of each Member of the Commonwealth to be consulted about foreign policy, and to take part in any international negotiations if it should so desire—it is plain from these facts that there exists in British public law and practice a close constitutional relationship between the Members of the British Commonwealth, a constitutional relationship that does not exist between the other nations of the world.

That relationship is, in a sense, a survival, a survival of a still closer and more rigid legal relationship that existed in the past. But it is also much more than a survival. For if the rigidity of the legal bonds between the Members of the Commonwealth has been relaxed, the strength of those bonds has been correspondingly increased. The relationship of these Members, although a survival, is not a relationship that now consists simply in certain constitutional arrangements or in certain statutory or conventional rights and obligations. On the contrary, it is an organic relationship, expressed in and vivified by the new political institutions that have been created by the Commonwealth to meet the new situation which the self-government of the Dominions has brought about. As the Dominions have increased the measure of their autonomy, the statesmen of the Commonwealth have had to solve the problem of securing effective practical co-operation among their Governments. To do so, they had to secure parallel and simultaneous action among independent authorities, none of whom had jurisdiction in the territories of the rest; and to this end an institutional machinery of consultation was required, based on what the Balfour

Committee called 'free association,' and depending for results on the unanimous goodwill of all, and on what Smith has called 'a general understanding that the interests of Empire demand the making of every effort to harmonise policy and executive action.'<sup>1</sup> Such an institutional machinery has been created; and although much of it is comparatively new, it has already by its work given new life and new force to the constitutional relationship that exists between the Members of the British Commonwealth.

For this reason, and because they now constitute an essential part of the constitutional organisation of the Empire, it is necessary to describe briefly those new political institutions which the Members of the Commonwealth have collectively created and which they now collectively maintain.

They are as follows :—

#### THE IMPERIAL CONFERENCE.

The most important of them is the Imperial Conference, which has been described above. With each meeting the importance of the Imperial Conference in the system of the Commonwealth has increased, the scope of its work has widened,<sup>2</sup> it has become more and more the supreme organ of British and Dominion co-operation in government affairs. It has now an absolutely established constitutional position, and great

<sup>1</sup> *Canada and World Politics*, p. 40.

<sup>2</sup> The following is a list of the subjects dealt with in the fourteen reports of the Economic Sub-Committee of 1926:—Wool Statistics, Statistics of Foodstuffs in Cold Storage, Empire Statistics, Industrial Standardisation, Oil Pollution of Navigable Waters, Unification of Rules relating to the Bills of Lading, Conventions relating to Limitation

of Shipowners' Liability and Maritime Mortgages and Liens, Conventions relating to the Immunity of State-owned Vessels, Valuation of Goods for Customs Purposes, the Imperial Shipping Committee, Immunity of State Enterprise from Taxation, Taxation of Non-resident Traders, Exhibition within the Empire of Empire Cinematograph Films, Surveys of Empire Trade; *vide* Cmd. 2769 (1926), appendix xiv.

practical authority with the Parliament and people of every Member of the Commonwealth.

#### THE COMMITTEE OF IMPERIAL DEFENCE.

Next to the Imperial Conference must be mentioned the Committee of Imperial Defence, which was first created in 1904. The Committee of Imperial Defence is formally a committee of the British Cabinet, but representatives of the Dominions are admitted to its meetings whenever questions affecting the Dominions are discussed.<sup>1</sup> Such representatives have at various times, and always at meetings held during the sessions of the Imperial Conference, played a considerable part in its deliberations. Sir Cecil Hurst has said that the work of the Committee of Imperial Defence 'is an outstanding example of successful co-operation between the British and Dominion Governments upon the basis of mutual help and advice.'<sup>2</sup>

Its work, as described by Smith, illustrates well the general system of co-operation in the Commonwealth.

'It is now agreed,' he says, 'that *each of the Dominions is responsible for its own defence, and no attempt is made to restrict their autonomy by Imperial authority.* At the same time it has been found possible, chiefly through the agency of the Imperial General Staff co-operating with the General Staff in the Dominions, to agree upon the adoption of common methods and machinery, designed to enable the various forces of the Empire to work together under a single command in time of war.'<sup>3</sup>

This co-operation has been organised on the initiative, and under the direction, of the Committee of Imperial Defence.

<sup>1</sup> In pursuance of a decision taken at the Imperial Conference of 1911.

observations on the C.I.D., *vide* Hurst, *op. cit.*, pp. 39 *et seqq.*

<sup>2</sup> For some other interesting

<sup>3</sup> *Canada and World Politics*, p. 40. (My italics.)

## THE COMMITTEE OF CIVIL RESEARCH.

Another organ of inter-Governmental co-operation, identical in character with the Committee of Imperial Defence, is the Committee of Civil Research, set up in June 1925. It is intended that in the work of this Committee the Dominions shall participate precisely as they do in that of the Committee of Imperial Defence, and that the Governments shall place at its disposal a joint fund of public money to be expended for the common benefit of the Commonwealth as a whole.<sup>1</sup>

The co-operation of the Governments of the Commonwealth in these political institutions is obviously an element in the constitutional relationship between them. They are, as has been said, an integral part of the constitutional machinery by which the Empire is governed, and they are specially important for the present purpose because they give reality and force to the legal rights and obligations which have been described.

## THE COMMON MACHINERY OF DIPLOMATIC AND CONSULAR MISSIONS ABROAD.

Another institution which must be mentioned in the present connection is that of the diplomatic and consular service which the British Government maintains in foreign countries. This service is now used by Dominion Governments, in countries where they do not themselves maintain missions (that is to say, practically everywhere), more or less as if it was their own. The negotiations for the Kellogg Treaty in 1928, and

<sup>1</sup> The Committee of Civil Research has now eight Sub-Committees at work:—Tsetse Fly, Mineral Content of Natural Pastures, Native

Dietetics, British Pharmacopeia, Kenya Native Welfare, Empire Supplies of Quinine, Research Co-ordination, Geographical Surveying.

the conduct of these negotiations between the United States and the Governments of Australia, New Zealand, and South Africa, through the intermediary of the British Foreign Office, once more furnish an example of its use, and very many more could be found.<sup>1</sup>

Moreover, British Ambassadors, Ministers, and Consuls still give their assistance and protection equally to all British subjects whether they be Dominion or British citizens.<sup>2</sup>

Still more striking, the Governments sometimes agree all to act through a common plenipotentiary for the making of a treaty, as they did when they all entrusted the British Ambassador in Washington with the making of the Liquor Treaty with the Government of the United States in 1924.<sup>3</sup> This practice will in all probability become rarer in the future, but, like the common use of British diplomatic missions, it furnishes striking evidence to foreign Powers of the constitutional bond by which the Members of the British Commonwealth are joined.

That this common use of the British diplomatic service is of real use to the Dominions, and that Dominion statesmen are conscious of its full constitutional implications, is shown by the passage in the Report of 1926 entitled 'General Conduct of Foreign Policy,' to which reference has been made above, where it is said that: 'It was frankly recognised that in this sphere . . . the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain.' The phrase 'major share of responsibility' has an obvious constitutional as well as political importance.

<sup>1</sup> Cf. footnote to p. 238, *supra*.

<sup>2</sup> Cf. p. 159, *supra*.

<sup>3</sup> *Vide* Keith, *Constitution, Laws, and Administration*, p. 57.

## INTER-COMMONWEALTH EXCHANGE OF HIGH COMMISSIONERS.

The last Commonwealth institution to which reference must be made is that of the High Commissioners sent by the Dominions to London and by the British Government to the Dominions.

Under the heading 'System of Communication and Consultation,' the Balfour Committee wrote: 'The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. . . . Any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government, and the special arrangements which have been in force since 1918 for communications between Prime Ministers.'

The practical result of this recommendation has been the despatch of certain British High Commissioners to the Dominions. The Dominions have for many years already kept High Commissioners in London, but these High Commissioners have for the most part performed commercial functions. It is probable that in future their duties will be extended and their standing and authority increased, in order that they may be an effective channel of 'communication and consultation' by the maintenance of 'personal contact.' The first British High Commissioner to a Dominion was appointed to Canada in 1928, with the title 'High Commissioner in Canada for His Majesty's Government in Great Britain.'<sup>1</sup> As other Dominions follow the Canadian example, this new system will become a more and more effective method of achieving the purpose in view, namely,

<sup>1</sup> Vide *Times*, April 26, 1928. Also Toynbee, *op. cit.*, pp. 72 *et seqq.*

effective consultation on general policy in the intervals between meetings of the Imperial Conference.

A description has now been given of the various elements, legal and institutional, that go to make up the constitutional relationship between the Members of the Commonwealth. The facts that have been cited explain what learned writers mean when they speak of the 'constitutional unity of the Empire.' They explain, too, the undoubted and fundamentally important fact that although the Dominions have become for many purposes persons of International Law, the rules of International Law do not apply to their mutual relations or to their relations with the Mother Country. The difficulties raised by this point will be discussed in Chapter VII. For the moment it is enough to say that no one has ever yet suggested that the relations of Members of the Commonwealth *inter se* should be regulated, as the relations of foreign countries are regulated, by International Law. The Governments of the Members of the Commonwealth have left no doubt of their view upon the matter. Their representatives in each other's capitals are to be not diplomats, not 'Ministers,' but 'High Commissioners.'<sup>1</sup> At the Washington Disarmament Conference all the Members were counted together as having a single navy. This is plainly right; the relations of the Members of the Commonwealth cannot be regulated by International Law for the reason that the Members of the Commonwealth are already subject to another legal system, that of British Constitutional Law. This is the main conclusion to which the facts discussed in this chapter inevitably lead.

<sup>1</sup> These High Commissioners do not enjoy general diplomatic status or immunities, but the Dominion High Commissioners in London are

exempt from British Income Tax and have other privileges. *Vide* Oppenheim, *International Law*, 4th ed., i. p. 610.

## CHAPTER VII

### SOME UNSOLVED PROBLEMS IN THE INTERNATIONAL JURIDICAL STATUS OF THE DOMINIONS

It has been argued in the preceding chapters that the Covenant of the League of Nations and the Imperial Conference Report of 1926 were documents which together registered a decisive advance in the development of the international status of the Dominions. That advance took place, as it had to take place if it was to be effective, in the spheres both of British Constitutional Law and of International Law. Between them these documents settled beyond dispute that the Dominions had acquired many of the most important rights and obligations of the Members of the international Society of States. They laid down the essential principles in the light of which every question concerning the status of the Dominions, whether it be primarily constitutional or primarily international, must henceforward be discussed. But they did not settle, and could not settle, every question concerning Dominion status which may arise. They could not, because it is inevitable that there will be still further developments in the rights and obligations of the Dominions in years to come. In the last two decades the movement of constitutional change in the British Commonwealth has been rapid almost beyond belief. That movement is not ended. There was nothing final about the Report of 1926. The Committee who drew it up were the first to disclaim any such idea.

'We hope,' they said, '*that we may have laid a foundation on which subsequent conferences may build.*'<sup>1</sup>

There *must* be further building, there must be future development, because there are still problems of Dominion status to be solved. 'It is manifest,' Sir Robert Borden has said, 'that the Commonwealth has not solved all its problems. Any one would be utterly rash who would venture to predict the method by which the voice and influence of the Dominions will at all times receive such adequate consideration that the unity of the Commonwealth in external relations will not be impaired.'<sup>2</sup> Some of the problems Sir Robert Borden had in mind, though real enough, are politically remote; some of them are legally intricate in the extreme; some may never become issues in practical policy; but all of them deserve consideration lest some day they should become acute. The purpose of this present chapter is nothing so ambitious as to furnish solutions to these problems: it is rather to draw attention to the fact that they exist.

In the discussion of various matters dealt with in Chapters V. and VI., it appeared that the evolution of the international rights of the Dominions is not yet complete, and that therefore further developments in regard to them must be expected in the future. The developments to be expected may be in the domain either of International or of British Constitutional Law.

Thus, for example, the right of the Dominions to establish diplomatic missions of their own in foreign states is now definitely acquired in British constitutional practice, but it has not yet received general international recognition by the other Members of the Society of States. However probable it may seem

<sup>1</sup> Cmd. 2768 (1926), p. 13. (My italics.)

<sup>2</sup> *J.R.I.I.A.*, July 1927, p. 207.

to-day that such recognition would be at once accorded if it were asked for, there must yet remain an element of doubt, which only time and future practice can finally remove.<sup>1</sup>

Likewise the Dominions have definitely acquired the constitutional right to decide for themselves when international treaties shall be ratified by the Crown on their behalf. But there is still a doubt as to what the method of procedure for Dominion ratifications will be in future. At present the regular procedure is as above described: the preparation by the British Foreign Office, on the demand of the Dominion Government, of an instrument of ratification, which instrument is then signed by the King in person and deposited by the British Secretary of State for Foreign Affairs. But, as was also pointed out above, a number of Dominion ratifications have taken place by the simpler and more direct method of a Dominion Order in Council, deposited directly by the Dominion Government itself. The difference between these two procedures is, perhaps, of no great importance in International Law, but it is at least of interest in its relation to the development of the British constitutional system. Once more, only time and future practice can settle in what form Dominion rights in this matter will be exercised.<sup>2</sup>

Again, there is the question, very important in International Law, whether the principle of a common Law of Nationality throughout the British Commonwealth will be effectively maintained. As the last Imperial Conferences have shown, the Dominions are very ready to adopt unanimous resolutions and reports in favour of a common Law of Nationality. The real question is whether their Parliaments will be willing to implement these resolutions and reports effectively by passing promptly similar and simultaneous legislation when it

<sup>1</sup> Cf. *supra*, pp. 152-3 and 205-6.    <sup>2</sup> Cf. *supra*, pp. 179 *et seq.*, 199, and 208.

is required. Hitherto practical experience on the point has not been wholly satisfactory, but once more only time can answer the problem that is raised.<sup>1</sup>

But it is not the purpose of this chapter to discuss straightforward questions of constitutional development such as these, in which nothing is required but a far-sighted or a supernatural power of speculation. Its purpose is rather to deal with certain concrete legal problems of Dominion status, problems of which the juridical elements are known, but in which nevertheless the true solution is, or is thought to be, in doubt.

It will be convenient to begin with certain questions of importance rather from the point of view of British practice than from that of International Law.

#### THE POSITION OF DOMINION DIPLOMATIC MISSIONS.

It has sometimes been asked what will be the true position of a Dominion diplomatic mission in a foreign capital where a British mission is already in existence. The point has been elaborately debated in the Canadian House of Commons.<sup>2</sup> What, it was there asked, will be the position of the Canadian Minister in Washington? With what questions will he really have to deal? Will he be subordinate in any way to the British Ambassador? Will he be able on his own untrammelled initiative to see the Secretary of State or the officials of the United States Government? On what occasions will the Secretary of State send for him, and on what footing will they negotiate together?<sup>3</sup>

The answer to these questions was extremely obscure in the days when Mr. Bonar Law's declaration of 1920 still held the field. If the Canadian Minister was to be

<sup>1</sup> Cf. *supra*, pp. 219-20.

<sup>2</sup> Vide e.g. *Times*, May 30, 1928.

<sup>3</sup> For some discussion of these points, vide Duncan Hall, *British Commonwealth of Nations*, pp. 253-9;

also Keith, *Journal of Comparative Legislation*, February 1927, pp. 87-8; *Representative Government*, 1928 ed., ii. pp. 893-5; Toynbee, *op. cit.*, pp. 64-71.

a member of the staff of the British Embassy, if he was to replace the British Ambassador when he was absent, was he not in some real sense the Ambassador's subordinate? Indeed, how could it be said that the Canadian Minister had a separate legation at all, if it was thus liable virtually to be merged at a moment's notice in the British Embassy? Would it not be a Canadian section of that Embassy rather than a separate organism in itself?

This complication, however, has now been swept away,<sup>1</sup> and the question can be discussed on the assumption that the Canadian mission is a true legation, quite separate and distinct from the British Embassy. What principles, if any, are there by which the Canadian Minister and the United States Secretary of State may guide their action?

There is one of Mr. Bonar Law's principles, it is sometimes said, which still remains: the principle that the establishment of the Canadian legation 'will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.' What does this mean in practice? No one has yet explained. Writing in 1923, Keith declared that it meant that the Canadian Minister 'could only conclude a treaty with the assent of the Imperial Government,'<sup>2</sup> thus implying a definite subordination of the Canadian Minister to the British authorities in Downing Street. It has been shown above that that hypothesis at least can no longer be maintained. Equally a theory put forward by Lewis in 1922 can no longer be upheld. He then suggested that the principle of the 'diplomatic unity of the Empire' meant that 'group questions will continue to be dealt with by the

<sup>1</sup> *Vide supra*, pp. 148 *et seqq.*

<sup>2</sup> *Journal of Comparative Legislation*, November 1923, p. 167.

British Ambassador, the functions of the Dominion representative being confined to questions of purely Dominion concern.'<sup>1</sup> This doctrine is ingenious but wholly inconsistent with the subsequent rulings of the Report of 1926. For in the section of that Report which deals with the establishment of Dominion diplomatic missions the following words appear :

'In cases other than those where Dominion ministers were accredited to the heads of foreign states, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and the foreign Governments, *in matters of general and political concern.*'<sup>2</sup>

But '*matters of general and political concern*' are precisely the 'group questions' of which Lewis spoke ; and the Report provides not that they shall in all cases be dealt with by British missions, *but merely that when there is no Dominion mission* it is desirable that they should be dealt with through the channel of the existing British mission. In other words, the Report specifically recognises the right of a Dominion diplomatic mission to deal with 'group questions of general and political concern' in so far as they affect its own Dominion, and Lewis' doctrine thus falls to the ground. Moreover, to make assurance doubly sure, there is, as has been shown above, decisive practice on the point ; in 1928 the United States Government invited the Canadian and Free State Governments to be original parties to the Kellogg Pact (which the British Government itself had declared to be a group question) not by Note to the British Ambassador, but by Note sent through their own legations in Ottawa and Dublin.<sup>3</sup>

Does the principle of 'the diplomatic unity of the Empire,' then, mean anything at all in this connection ?

<sup>1</sup> *B. Y. I. L. L.*, 1922-3, p. 37.

<sup>2</sup> *Cf. supra*, p. 238, n. 3 ; also p. 208.

<sup>3</sup> *Cmd.* 2768 (1926), p. 27.

It may respectfully be doubted if it does. Perhaps in 1920 it had a definite meaning in the minds of Mr. Bonar Law and his colleagues. But now it appears to have become nothing but a phrase, and not even a very helpful phrase. It is none the less possible, without troubling about debatable deductions from 'diplomatic unity,' to lay down certain principles of action which will be followed by the British and Dominion missions and by the foreign Governments to which such missions are or may hereafter be accredited. It will perhaps be simpler and clearer to state these principles in terms of the problem which results from the existence of the Dominion missions in Washington.

First, then, under the constitutional convention about 'consultation'<sup>1</sup> it will be the duty of the British and Dominion Ministers to keep closely in touch on *all* questions of whatever kind with which they have respectively to deal. If the Governments whom the Ministers represent have taken seriously the principles they accepted in the Report of 1926, they must have given these Ministers standing instructions to this effect. Thus, not only will it be impossible, as Keith has said, 'under the new rule . . . for any Dominion Minister to start negotiations with the United States behind the back of the British Ambassador,'<sup>2</sup> but it will be the duty of the British, Canadian, and Irish missions to keep fully in touch with one another in regard to everything they do, whether it concerns purely British or Dominion 'national' interests, or matters of more general Commonwealth concern. In short, as the first British Note to the United States Government on the subject declared, 'the Irish Minister would be at all times in the closest touch with His Majesty's Ambassador.'<sup>3</sup>

<sup>1</sup> Cf. *supra*, pp. 165 *et seqq.*

<sup>2</sup> *Journal of Comparative Legislation*, February 1927, p. 87.

<sup>3</sup> Note of June 24, 1924; *vide* Cmd. 2202 (1924).

Second, the Canadian and Irish Ministers will treat with the Secretary of State or his assistants on every question of purely Canadian or Irish concern. They will do so not with the special 'assent' of the British Ambassador or the British Government, but as of right, and they will act in all ways in full independence. As the British Note just quoted declared, the Irish Minister would 'take charge of all affairs relating only to the Irish Free State,' and would be the 'ordinary channel of communication with the United States Government on these matters.'<sup>1</sup> The British Ambassador, of course, will deal exclusively with British questions, while he will also continue to deal with Australian, South African, and New Zealand questions if the Governments of these Dominions, instead of appointing their own special agents, desire that he shall represent them. It will, of course, fall within the normal functions of the Canadian and Irish Ministers to give diplomatic protection and assistance to Canadian and Irish 'citizens' who are domiciled or travelling in the United States.

Third, if a question involves, say, both British and Canadian interests, the British Ambassador and the Canadian Minister will deal with it together by joint or simultaneous action. It is theoretically possible that in such a case the Canadian Minister will agree that the British Ambassador should represent them both, or *vice versa*; but in view of the character of what may be called Dominion diplomatic history in the past, it seems much more likely that he will do nothing of the kind. The two Ministers will of course consult together about the course to be pursued, and it may well be that they will conduct the whole negotiation by joint interviews with the Secretary of State or his assistants, and by joint correspondence and joint action.

<sup>1</sup> Note of June 24, 1924; *vide* Cmd. 2202 (1924). *Vide* also Note to Chapter VII. on p. 342, *infra*.

More probably, however, they will take parallel and simultaneous action after consultation. This is what appeared to be in the mind of the Canadian Prime Minister, Mr. Mackenzie King, when the question was raised in the Canadian House of Commons: 'He saw little difficulty in defining the relations between Canadian and other British diplomatic representatives,' and said: 'It is conceivable that in some cases the foreign affairs of one part of the Empire will intersect the arc which relates to the foreign affairs of another part of the Empire. In that event one would assume that the obligation with reference to what is held common would be a joint obligation that the two representatives, or more if there are such, would carry out in trusteeship, in co-operation with each other, and after consultation.'<sup>1</sup>

Fourth, it is plain that under the rules of the Report of 1926 relating to the convention of consultation, it is for each Government to decide freely for itself whether its interests are involved in any question, and whether therefore it desires to take part in any negotiations that may be begun. On this point, therefore, there can be no possibility of misunderstanding or dispute.<sup>2</sup>

Fifth, in a 'group question' of general or political Commonwealth concern, the British Ambassador and the Canadian and Irish Ministers will likewise act together. Again, it is in theory possible that the Dominion agents, by instruction from their Governments, will ask the British Ambassador to act on their behalf.<sup>3</sup> Indeed, the British Note quoted above de-

<sup>1</sup> *Times*, May 30, 1928.

<sup>2</sup> Cf. *supra*, pp. 165 *et seqq.* The statements in this paragraph and the statements made in connection with the second, third, fifth, sixth, and seventh points in the text are of course wholly unaffected by the declaration in the British Note of June 24, 1924, quoted above, in which it is said that: 'Any question which

may arise as to whether a matter comes within the category of those to be handled by the Irish Minister or not would be settled by consultation between them [*i.e.* between the Irish Minister and the British Ambassador].'

<sup>3</sup> This was suggested as possible in 1920 by Duncan Hall, *British Commonwealth of Nations*, p. 257.

clared: 'Matters which are of Imperial concern or which affect other Dominions in the Commonwealth in common with the Irish Free State will continue to be handled as heretofore by this Embassy.'<sup>1</sup> This principle has not been followed in practice, and in any case it seems, on general grounds, more likely that after preparatory consultation the British and Dominion agents will treat jointly in common or simultaneous interviews with the representative of the United States. An example of this case is furnished by the negotiations of 1928 for the Kellogg Treaty of Renunciation of the Right of War, in which, after prior consultation, each Dominion carried on a separate negotiation with the United States Government. On this occasion communication between Australia, New Zealand, South Africa, and the United States was carried on through the British Foreign Office; between Canada, the Irish Free State, and the United States by diplomatic Notes exchanged directly through their legations in Washington, Ottawa, and Dublin.<sup>2</sup>

Sixth, the Secretary of State and the officials of the United States State Department will receive the Canadian and Irish Ministers, and will treat with them on Canadian and Irish questions precisely as they would receive the diplomatic agents of any foreign Power. They will deal with them, that is to say, as plenipotentiaries with authority to speak for Governments which have power to give effect to their decisions; it will never enter the head of the Secretary of State to seek from the British Ambassador confirmation or approval of what the Dominion Ministers may say or do. Lest there should be doubt on this point, the Note from the British Government to the United States Government concerning the establishment of the Irish legation in Washington was explicit. 'In matters falling within

<sup>1</sup> § 2 of Note of June 24, 1924. Cmd. 2202 (1924).

<sup>2</sup> Vide *Times*, May 22 and 25, 1928; Wheeler-Bennett, *op. cit.*

his sphere,' it runs, 'the Irish Minister would not be subject to the control of His Majesty's Ambassador, nor would His Majesty's Ambassador be responsible for the Irish Minister's actions.'<sup>1</sup>

Lastly, on 'group questions' the Secretary of State and his assistants will deal with the British and Dominion agents precisely as they would deal with any other group of foreign diplomats whose Governments were jointly negotiating on some question of common interest to them all. They will treat them all, again, as plenipotentiaries speaking for Governments which cannot be bound without their own consent. There will, indeed, be nothing abnormal in such negotiations from the State Department point of view, unless it be that the British and Dominion agents act together more closely and intimately than most foreign groups.

It was said in 1922 by Lewis, before any Dominion legation had actually been set up, that 'the establishment of Dominion diplomatic representatives must inevitably give rise to difficult questions as to their exact relations to the British Ambassador.' There would seem to be no reason why, if the clear and well-established principles of the Report of 1926 are applied in the ways outlined above, these 'difficult questions' should not be easily and harmoniously solved. Up to the present time all the available experience supports the view that they can and will be. Mr. Mackenzie King has officially declared that 'the diplomatic representatives of Great Britain, Canada, and Ireland have co-operated harmoniously in Washington, and Sir Esmé Howard<sup>2</sup> had recently given testimony to the success of the experiment.'<sup>3</sup>

<sup>1</sup> Note of June 24, 1924; *vide* Cmd. 2202, United States, No. 2 (1924).

<sup>2</sup> The British Ambassador in Washington.

<sup>3</sup> *Times*, June 13, 1928.

### HAVE THE DOMINIONS THE RIGHT TO SECEDE FROM THE BRITISH EMPIRE ?

Another problem which has been considerably discussed, which primarily involves disputed questions of British Constitutional Law, but which is also of theoretical interest in an examination of the international position of the Dominions, is whether these Dominions have the right to secede, if they desire to do so, from the British Empire. Is it within the constitutional powers of a Dominion Government to sever its connection with the British system, to cease to be a Member of the Commonwealth, to declare its 'independence' and to invite foreign Powers to give it recognition in International Law as a new fully 'sovereign' Member of the Society of States ?

It is argued, on the one hand (for example, by Duncan Hall),<sup>1</sup> that the Dominions unquestionably have 'the constitutional right of secession'; that since Canada is equal in status with Great Britain, the Canadian Government could prepare and pass through its Parliament a Bill to make Canada an 'independent' republic, just as the British Government could prepare and pass a Bill declaring Great Britain a republic; that the Canadian Government has the right to 'advise' the King to consent to such a Bill; that the British Government has no longer any right to give him contrary advice; and that the King would have no constitutional right to refuse his consent to such a Bill, if he were advised to give it by his Canadian Ministers. Duncan Hall adds the perhaps disputable condition that this constitutional right to secede would only exist provided the demand for secession by a Dominion people were virtually unanimous.

It is argued, on the other hand (for example, by

<sup>1</sup> *British Commonwealth of Nations*, pp. 262-3.

General Smuts), that the Dominions have no right to secede, and that if such a Bill as that suggested were sent up by a Dominion Government for the King's consent, the King would not only have the 'constitutional right to veto it,'<sup>1</sup> but could not constitutionally accept any such unilateral effort to dissolve the bond of union.<sup>2</sup> Keith appears to support this view, and, in pursuance of his doctrine that a Dominion Government has no right to advise the King directly, he declares: 'That the Imperial Government would refuse assent to a Bill purporting to sever the ties between the Irish Free State or the Union of South Africa and the Empire is at present certain; assent could be accorded only after full agreement at an Imperial Conference, where the views of the Empire as a whole can be ascertained';<sup>3</sup> and again: 'A Bill to provide for the secession of the Irish Free State or for some measure vitally injurious to the safety or essential interests of the United Kingdom would not be allowed to pass by any British Government, and, however little probability there may be of any such measure, the power to hinder its operation must be retained.'

Elsewhere Keith produces another argument against the right of secession. 'It is clearly impossible,' he says, 'under the Dominion constitutions to dissolve by any Dominion legislation the Imperial tie. The power of the Union Parliament is derived from the South Africa Act 1909, passed by the Imperial Parliament in order "to unite the British colonies in South Africa under one Government in a legislative union under the Crown of the United Kingdom."' He then recites similar sentences from the constitutions of the other Dominions, in which it is declared that the Dominion

<sup>1</sup> *Vide* speech made on September 13, 1919, and cited by Duncan Hall, *op. cit.*, p. 262.

*Comparative Legislation*, November 1923, p. 162.

<sup>2</sup> *Vide* Keith, *Journal of Comparative Legislation*, February 1927, p. 87.

Governments are established 'under the Crown of the United Kingdom,' and he proceeds: 'These facts are clear evidence that nothing save Imperial legislation would avail to dissolve the bond of Empire.'<sup>1</sup>

There are in these arguments against the right of secession four points of importance.

The first is whether the King has the constitutional *duty*, as General Smuts alleged, to veto a Secession Bill. The answer would appear to be an unhesitating 'No.' There is nothing either in British statute law or constitutional practice to support the view that the King cannot agree to Bills the effect of which would be to detach portions of his Dominions from his allegiance. On the contrary, he has frequently in the past—even within the last few years—agreed to proposals made to him by Parliament for the cession of British Crown colonial territory to foreign Powers.<sup>2</sup> If he has no legal or constitutional duty to veto such cession, it would seem to follow that he has no duty to veto the secession of a self-governing Dominion.

The second point is whether the King, if he has no *duty*, has nevertheless a constitutional *right*, as General Smuts alleged, to veto a Secession Bill which his responsible Ministers advise him to accept. It is plain that by the letter of the existing statute law he has the legal right to do so, as he has the legal right to veto any Bill of any kind whatever. But with regard to every other

<sup>1</sup> *Constitution, Administration, and Laws of the Empire*, p. 21. He also argues that under Article 10 (q.v. Appendix I.) of the Covenant of the League of Nations every Member of the Commonwealth would have to assent before secession could take place. If this argument were accepted, it would mean, of course, that the seceding Dominion would have to secure the assent, not only of every Member of the Commonwealth, but of every foreign Member of the League as

well. Since, however, Keith elsewhere argues that the Covenant does not apply to the relations of the Members of the British Commonwealth *inter se*, his point about Article 10 may for the present purpose be neglected. Cf. *infra*, pp. 305 *et seqq.*

<sup>2</sup> *E.g.*, the cession of part of Jubaland to Italy under the Anglo-Italian Treaty (East African Territories) Act, 1925; Statutes, 1925, 15 George v., p. 149.

kind of Bill, that legal right of veto is as dead as Queen Anne; it is rendered null and void by his constitutional duty to accept his Ministers' advice. Where is the statute law or constitutional practice which can show that his legal right of veto, dead in every other matter, still lives in respect of Bills providing for the secession of a Dominion? There is no such law or practice, and it is therefore certain that the King has no constitutional right to veto a Secession Bill which his responsible Ministers advise him to accept.

But the third point is this: Who for this purpose are his 'responsible Ministers'? Are they his Dominion Ministers who send him the Secession Bill, or have his British Ministers an overriding right to give him contrary advice which he must accept? Keith, as is shown by the sentences quoted above, holds the latter view. His argument is, first, that Dominion Ministers cannot directly advise the King on any matter, that there must always be advice by British Ministers as well, that without concurring advice by British Ministers the King has no constitutional right to sanction what his Dominion Ministers desire; second, that the advice thus given to him by British Ministers is not a mere formality—that, on the contrary, they may in their discretion either advise him to accept or to reject Dominion proposals as they wish. And he holds that 'this power to hinder the operation' of a Secession Bill '*must* be retained'<sup>1</sup> by British Ministers, lest the secession proposed should be 'vitally injurious to the safety or essential interests of the United Kingdom.'

It must be said again that this doctrine of Keith's, in so far as it is an argument in constitutional law, is a direct challenge to the principle of the Dominion Prime Ministers' Memorandum of March 1919, that while 'the Crown is the supreme executive in the United Kingdom

<sup>1</sup> The italics are mine.

and all the Dominions . . . it acts on the advice of different Ministers within different constitutional units.'<sup>1</sup> Yet this principle of the Dominion Prime Ministers has been acknowledged repeatedly and acted upon by the Governments of the Commonwealth ever since it was first announced ; the whole of the Report of 1926 was consciously and consistently founded on it ; unless it is accepted, there is hardly a paragraph of that Report which can be made to bear a reasonable meaning. In particular, the section of the Report which deals with Dominion legislation declares roundly that, with the few exceptions above described,<sup>2</sup> 'It is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters *relating to its own affairs*,'<sup>3</sup> and that 'it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain *in any matter appertaining to the affairs of a Dominion* against the views of the Government of that Dominion.'<sup>4</sup> The exceptions to this principle which were mentioned in the Report were only provisionally allowed, subject to further investigation as to the best means for their removal. In any case, they do not include, except possibly in the case of the Canadian constitution, any exception that would justify suspension or rejection of a Secession Bill.

So far as these specific exceptions are concerned, therefore, they do not offer ground for thinking that the general constitutional principle concerning Dominion legislation would not apply to a Secession Bill, or for holding that British Ministers would have the constitutional right to advise the King to reject it.

But there is another consideration relating to the question, Who for this purpose are the King's respon-

<sup>1</sup> Memo. by Dominion Prime Ministers, Mar. 12, 1919, cited by Lowell and Hall, 1927, p. 624.

<sup>2</sup> *Vide supra*, pp. 235-7.

<sup>3</sup> Cmd. 2768 (1926), p. 17. (My italics.)

<sup>4</sup> *Ibid.* (My italics.)

sible Ministers? It is this. Under the doctrines of the Report of 1926, Canadian Ministers have the exclusive right to advise the King 'in any matter appertaining to the affairs of their Dominion.' But would a Secession Bill be such a matter? Certainly, a Canadian Secession Bill would 'appertain to the affairs' of Canada; but would it not also appertain to the affairs of Great Britain and of the other Members of the Commonwealth as well? Suppose that, in Keith's words, it were held to be 'vitally injurious to the safety of the United Kingdom,' would it then be reasonable to hold that it could be settled by the unilateral action of the Government of Canada alone? Would it not, in fact, then be pre-eminently a 'group question' of the kind shortly to be discussed? And, if so, would not British and other Dominion Ministers have the right also to advise the King about it?

The question is a nice one, and it appears to the present writer that there is no legal answer for which it can be claimed that it is certainly and unquestionably right. Only time and practice could determine what view the Governments might take. It is precisely one of the issues in respect of which the twin principles of autonomy and 'free association' might come into conflict. The only conclusion that can be reached, therefore, on the point now under discussion—who are the King's responsible Ministers?—is far from satisfactory. It is simply this—that British Ministers would now have no constitutional right to advise the King to reject a Dominion Bill providing for secession from the Empire, unless it were on the ground that such a piece of legislation did not 'appertain to the affairs' of Canada only, but equally to the affairs of every Member of the Commonwealth as well. Certainly this ground would justify them in demanding 'prior consultation'; whether it would justify them further is open to doubt.

The fourth point is equally obscure. It is Keith's argument that since the Dominion constitutions have been created by 'Imperial' legislation which lays down in the respective Acts that the Dominions are to be Unions 'under the Crown of the United Kingdom,' therefore 'Imperial' legislation is equally required to declare that they shall no longer be under that Crown. The argument certainly has great force in the case of Canada, where, under the British North America Act of 1867, practically no amendment of the constitution can be made without an Act of the British Parliament. But in Australia, South Africa, New Zealand, and the Irish Free State the Dominion Parliaments have power to amend their own constitutions : <sup>1</sup> that power is expressly given to them under their constitutions ; there is no limitation upon it, in virtue of which any special class or kind of amendment may be declared *ultra vires* ; and if they have power to amend other parts of the constitution, it is difficult to see why they should not have power to amend that part which connects them with the British Crown. The Imperial legislation has created bodies which are 'sovereign' in respect of the remainder of the constitution which regulates their system of government ; why should they not be sovereign in respect of this part too ?

There is, however, an answer to this argument which may perhaps be made. It may be said that the power granted to Dominion Parliaments to amend their respective constitutions was only granted to them subject to the general reservations contained in the Colonial Laws Validity Act of 1865 ; that among these reservations is the provision that any Dominion legislation inconsistent with previous British 'Imperial' legisla-

<sup>1</sup> *Vide* Keith, *Constitution, Administration, and Laws of the British Empire*, pp. 21-4, 202, 228, 230-1. Also Harrison Moore, *Commonwealth*

*of Australia*, 2nd ed., pp. 597 *et seqq.*, and Article 128 of the Australian Constitution, *ibid.*, p. 663.

tion would be *ipso facto* null and void; that while ordinary amendments to a constitution could not be held to be in conflict with the original Imperial Act which created that constitution, this would *not* be true of an amendment which modified the fundamental basis on which the whole constitution was founded, namely, that the Dominions should be a 'Union under the Crown of the United Kingdom.' This contention implies the premiss that the power to amend granted to Dominion Parliaments was restricted to institutional changes consistent with the essential purpose of the Imperial Act, and that this essential purpose was to create a Union which must remain under the Crown of the United Kingdom until such time as a new Imperial Act should otherwise decree.

This may well have been, in fact, the intention of the Imperial Parliament with regard to, say, Australia in 1900. But none the less, in view of the terms of the Australian Constitution with regard to amendment (Article 128)<sup>1</sup>, this answer is not plainly and obviously conclusive. Moreover, it is also necessary to consider the results of the new constitutional conventions with regard to Dominion legislation that have now grown up. It is true that until the Expert Committee set up in 1926 makes its report, the Colonial Laws Validity Act will remain upon the statute-book; but can it be said that the principle of that Act now being discussed still forms part of the effective constitutional practice of the British Commonwealth? Can it be said that because thirty years ago a constitutional amendment providing for secession would have been held to conflict with the previous Imperial legislation

<sup>1</sup> Moore (*ibid.*, p. 602) says of this article: 'The power of constitutional amendment is . . . regarded as . . . an especial mark of self-government. The making of the Constitution and

its interpretation have been seen to be jealously preserved to Australia, and the same policy is apparent with respect to its alteration.'

by which the constitution was set up, the same thing is still equally and necessarily true to-day? Is it therefore really certain that even if Imperial legislation would have been required to effect secession then, it would still be required to-day? The point is at least open to reasonable doubt.

It may well be thought that this answer to Keith's argument is not conclusive. And if he is right, then it follows that, although neither the King nor his British Ministers have any legal or constitutional right or duty to impose a veto on a Dominion Bill providing for secession, yet the British Parliament remains the only sovereign body in the matter, and accordingly the constitutional right of a Dominion to secede by its own Parliamentary legislation cannot be admitted.

In any case, the point is sufficiently obscure, in respect of both the last two arguments considered. But it hardly merits longer discussion than it has here received. For, even if the doctrines which deny the Dominion right of secession are sound constitutional law, which is not certain, it is certain that they are not sound politics. And of the two the latter is by far the more important point. If in a Dominion a demand for secession arose strong enough to secure the passage of a Bill, it would not be by the legal or constitutional right of British Ministers to advise the rejection of that Bill that secession could be averted. Indeed, it could not be at that stage of affairs that British Ministers would seek to exercise their influence. If an Imperial Conference were required, as Keith suggests, to discuss the issue, it would surely have been summoned long before the Bill had passed through both the Houses of the Dominion Parliament. Moreover, and this is the point that matters, the Report of 1926 shows clearly that none of the Commonwealth Governments—least of all the British, for was it not Lord Balfour who

drafted the Report?—believed that it was by the maintenance of overriding legal or constitutional rights that the cohesion of the Empire could be maintained. If they believed that, why did they declare that ‘every self-governing Member of the Empire is now the master of its destiny’? that, ‘in fact, if not always in form, it is subject to no compulsion whatever’? that, while ‘every Dominion is now, and must always remain, the sole judge of the *nature* and extent of its co-operation [with the Commonwealth], no common cause will, in our opinion, be thereby imperilled’?<sup>1</sup>

It is certain, indeed, that the Governments of the Commonwealth rely, not upon legal bonds or constitutional disabilities, but upon the power of free association for common ends, to hold the British Empire together in the years to come. The wisdom of that attitude is proved by the fact that the movements for secession have not for many years been so weak in the Union of South Africa or in Ireland as they have been since the Report of 1926 was drawn up and published. We may be sure that if secession becomes again an issue of practical politics, which at present it is not, it will be, not the legal rights, but the political will of the various nations of the Commonwealth that will matter. Arguments in constitutional law are, in fact, beside the point. The real case was put to the British House of Commons by Mr. Bonar Law in 1920. ‘There is not a man in this House,’ he said, ‘who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions, Australia, Canada, chose to-morrow to say, “We will no longer make a part of the British Empire,” we would not try to force them.’<sup>2</sup> Keith himself, writing in 1916, stated this

<sup>1</sup> Cmd. 2768 (1926), p. 14. (The italics are mine.)

<sup>2</sup> *Hansard*, March 31, 1920.

very case no less trenchantly and decisively than Mr. Bonar Law: 'If it is really the will of the people of a Dominion to sever themselves from the Imperial control and to set up as an independent Power, it is impossible to believe that the Imperial Government would forbid the carrying out of this desire, though it would doubtless take steps to secure that the desire was a deliberate one, representing the decision of a real majority.'<sup>1</sup>

The only effective steps that could be taken to 'secure that the desire was a deliberate one, representing the decision of a real majority' would appear to be the summoning of an emergency Imperial Conference for the full public discussion of the issues involved as soon as serious proposals for a Secession Bill were first put forward by the responsible Ministers of a Dominion Government, commanding a majority in their Parliament. This, as was said above, would plainly be within the constitutional rights of the British Government under the Report of 1926.

This seems to be the only useful practical conclusion to be drawn from the arguments concerning the right of the Dominions to secede, to which so much attention has been given.

#### THE CONSTITUTIONAL CONVENTION CONCERNING 'GROUP QUESTIONS.'

There is another problem, as yet sufficiently obscure, which primarily involves questions of British constitutional practice, and in particular a question concerning the meaning of the Report of 1926, but which nevertheless must be of great importance in its effect upon the international action of Dominion Governments. This is the problem of what has been called the constitutional convention concerning 'group questions.'

<sup>1</sup> *Imperial Unity and the Dominions*, p. 148.

The Report of 1926 contains the following sentences :

(i) Under the heading of ' Negotiation ' :

*' Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty.'*<sup>1</sup>

(ii) Under the heading of ' Representation at International Conferences ' :

*' Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments.'*<sup>2</sup>

(iii) Under the heading of ' Representation at International Conferences ' :

*' Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.'*<sup>3</sup>

These references to a kind of treaty which, when it is made, ought to bind all parts of the Empire, are sufficiently cryptic. The rules concerning the preparation of such treaties are clear enough ; they are simply the ordinary rules for treaty negotiation discussed above, together with the obvious addition that disputes concerning the nature of a treaty—i.e., whether or not it requires ratification with the concurrence of all the Governments—shall be settled by ' consultation.' This addition plainly means that no one Government can decide for itself that its treaty does not need the concurrence of the rest. That is quite straightforward. But as to the character of this class of treaty not a hint is given. Everything is left to the wisdom of the

<sup>1</sup> Cmd. 2768 (1926), p. 22. (My italics.)  
<sup>2</sup> *Ibid.*, p. 25. (My italics.)  
<sup>3</sup> *Ibid.* (My italics.)

statesmen whose task it will be to apply the Report in years to come.

Is it possible, nevertheless, and without further indications either from the Report or from other official sources, to make an intelligible doctrine concerning the 'group questions' with which such treaties would deal? Duncan Hall, by a remarkable anticipation, made an attempt to do so, long before the Report of 1926 was ever written. As he is the only author who has made such an attempt, it will be useful to reproduce his theory in some detail.

Equality of status, he argues,<sup>1</sup> means equality for the Dominions in all respects, including, for example, equality in respect of the making of treaties and of the making of peace and war. But while the Dominions and Great Britain remain bound by the legal and constitutional bonds which now unite them, action of certain kinds taken by one Government inevitably involves the others. If a Dominion Government, in pursuance of its equal right to do so, declares a war, all the other Governments will automatically be at war as well. Therefore, it is not possible to admit that equality of status shall mean a separate right for each Government to take action on every question as in its exclusive discretion it may think fit. It must have that right in questions which concern itself alone—what Hall calls 'national questions.' But in matters in which the action of one Government inevitably involves or affects the rest—what Hall calls 'group questions'—there can be no separate right of action; the Governments must act 'together or not at all.' In 'national questions' the Government of one unit of the Commonwealth can by itself constitutionally give advice to the King. In 'group questions' advice must be given by all the

<sup>1</sup> Vide *British Commonwealth of Comparative Legislation*, October Nations, pp. 237-52. *Journal of* 1920, pp. 201-5.

Governments acting together. The new constitutional convention is simply this: that in such 'group questions' 'the Imperial Crown shall not take formal action unless all the Governments concur in advising it thereto';<sup>1</sup> while in respect of 'national questions' the Imperial Crown will act 'on the advice and responsibility of the Government of the particular Dominion concerned.'<sup>2</sup>

Hall holds that this new convention 'may be said to have been finally established as the result of its successful assertion by the Canadian Government in respect of the ratification of the Peace Treaty in 1919,' when the Canadian Government, in reply to Lord Milner's suggestion that the Treaty of Versailles could be ratified by the British Government without waiting for its previous submission to the Dominion Parliaments, urged that 'the King in ratifying the treaty ought only to act at *the instance of all his constitutional advisers throughout the Empire.*'<sup>3</sup> But later, Hall, doubting in spite of himself whether the Canadian precedent did 'finally establish' the convention, adds: 'All that this convention requires to establish it firmly is authoritative statement by the Imperial Conference as part of a general declaration of constitutional right.'<sup>4</sup>

Hall admits that the working of such a convention will in practice be most difficult. The rule for decisions regarding 'group questions' must of course, he says, be unanimity, and he quotes General Smuts in his support;<sup>5</sup> and, again of course, the Imperial Conference must operate, as at present, by the rule of 'one nation, one vote.' But he goes on to declare that these formal rules are merely safety-valves; in prac-

<sup>1</sup> *British Commonwealth of Nations*, p. 243.

<sup>2</sup> *Ibid.*

<sup>3</sup> Cited by Hall, *ibid.*, pp. 248-9 n. (The italics are mine.)

<sup>4</sup> *Ibid.*

<sup>5</sup> 'We are not going to be coerced by the majority. If a common organ is going to be established, no resolutions shall be taken without the unanimous agreement of all parts of the Empire.' *Times*, June 26, 1920.

tice, conflicts of opinion would be submitted for settlement to the Imperial Conference, and in that Conference the working system will in fact be a 'rough system of majority-rule.' Moreover, the convention need not necessarily mean that in every case there must be action taken or obligations assumed by all or by none. 'Even in the case of a group treaty, if one Member of the group refused to advise the Crown to ratify on its behalf a treaty which was accepted by all the other Members, the Crown might still ratify for those Members without binding the dissenting Member.'<sup>1</sup> A Government, that is to say, might concur in ratification by the other Governments taking place, although it preferred itself to stand out of the obligations thus assumed. Of course, on the other hand, the dissenting Government might *not* so concur, and in this case ratification by the others might, as Hall admits, lead in certain circumstances to the secession from the Empire of the dissenting Member. But so may any grave divergence of policy with regard to 'group questions.' Since these questions exist and must be faced, the only method for avoiding such grave divergence of policy is by 'the closest co-operation in matters of everyday international relationships,' out of which group questions of 'high policy' may at any time arise. The nearer the Governments can come to having common principles of action in their foreign policy, the less will be the difficulty of working the convention about the 'group questions' that involve them all.

If a convention of the kind which Hall describes does now in fact exist, then his observations about its probable working exhaust all that can be usefully said about the subject. His analysis is penetrating, and it appears to be as complete as it can be at the present

<sup>1</sup> *Op. cit.*, p. 251.

time. Nothing need be added, therefore, on that aspect of the matter.

But there are two other questions which remain obscure. The first is whether such a constitutional convention is now really 'firmly established.' The second is: what are the 'group questions' to which the convention, if established, must apply?

First, then, is there such a convention now established as that which Hall describes? Do the meagre and ambiguous sentences which have been quoted from the Report of 1926 constitute the 'authoritative statement' which he said was all that was required?

To answer this question it is necessary to analyse the convention into its constituent elements.

First, it is certain that the Dominions have now the constitutional right to be consulted whenever the British Government proposes to take any step in foreign policy which may affect their interests. This right was clearly established by the events and discussions of the Peace Conference in 1919, by the various negotiations concerning the Treaty of Versailles and the Conference of Lausanne, and by the terms of the Treaty Resolution of 1923 and of the Report of 1926.<sup>1</sup> This right exists pre-eminently in respect of questions of 'high policy' such as those which Hall describes as 'group questions.'

Second, it is equally certain that in respect of questions of 'high policy,' as well as in all other questions of its international affairs, no Dominion can be bound by international engagements of any kind to which it has not given its specific and previous consent.<sup>1</sup> This is clearly asserted in the section of the Report of 1926 on 'Procedure in relation to Treaties.' It is significant for the present purpose that it is repeated in the section on the 'General Conduct of Foreign Policy,' where it is

<sup>1</sup> Cf. *supra*, pp. 145-6 and 165-6.

said that 'the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Government.'

So far as these two points are concerned, it is certain that there is an established convention: that the British Government 'no longer has the right to advise the Crown in respect of vital questions of high policy involving the whole Empire, but must share this right with the Dominions.'<sup>1</sup>

But, third, is it further established that in certain questions nothing must be done unless all the Governments of the Commonwealth concur? that their advice must be given 'either together or not at all'? Here we are on much less certain ground. The language of the Report of 1926 is hesitating and vague. In one place it says, 'where by the nature of the treaty it is *desirable* that it should be ratified on behalf of all the Governments of the Empire.' Elsewhere it says that 'certain non-technical treaties *should*, from their nature, be concluded in a form which will *render them binding* upon all parts of the Empire.' In one place it is hesitating, or at most it recommends; in the other it is much more nearly imperative. But at best this is curious language in which to lay down a binding conventional rule, and moreover it is language that is in striking contrast with the clarity and precision of most of the rest of the Report. It is difficult to resist the conclusion that on this point its authors were no more than groping their way.

Nor has the practice of recent years given the solid foundation of precedent for this part of the convention which exists for the first two parts above discussed. It is not easy to say what are group questions, as will

<sup>1</sup> Hall, *op. cit.*, p. 248.

shortly appear; but such questions as the Peace Settlement with Turkey and Security Alliances involving a military guarantee would appear to be *par excellence* questions of 'high policy' of a kind which must affect every Member of the British Commonwealth. Yet neither in the Treaty of Lausanne nor in the Pact of Locarno was the principle followed that nothing should be done which was not 'binding upon all parts of the Empire.'<sup>1</sup> It was particularly striking that the military guarantee for the Franco-German frontier, given in the Locarno Treaty of Mutual Guarantee, was in fact given by Great Britain alone. The same is true of the military guarantee for the neutrality of the Straits contained in Article 18 of the Convention relating to the regime of the Straits which was attached to the Treaty of Lausanne. In this latter case, moreover, the Treaty was made, in accordance with the practice now abandoned, in the name of the British Empire as a whole; but the obligations relating to the Straits were specifically limited by Article 18 to Great Britain.<sup>2</sup> Yet in appearance these military guarantees, both of the Franco-German frontier and of the Straits, were pre-eminently 'group questions.'

It is true, so far as Locarno is concerned, that at the Imperial Conference of 1926 the Dominion Prime Ministers agreed to a Resolution expressing 'complete approval of the manner in which the negotiations had been conducted and brought to so successful a con-

<sup>1</sup> On the other hand, the proceedings with regard to the Kellogg Treaty of the Renunciation of War in 1928 furnish evidence in favour of Hall's hypothesis. Cf. also *infra*, pp. 279-80, 284, 288-9.

<sup>2</sup> *League of Nations Treaty Series*, xxviii. p. 135. Art. 18 reads in part as follows: 'The H.C.P., desiring to secure . . . that no act of war should imperil the freedom of the Straits or the safety of the de-

militarised zones, agree as follows: Should the freedom of the navigation of the Straits . . . be imperilled . . . by a surprise attack, or some act of war or threat of war, the H.C.P., and in any case France, Great Britain, Italy, and Japan, acting in conjunction, will meet such violation, attack, or other act of war . . . by all the means that the Council of the League of Nations may decide for this purpose.'

clusion.' But this does not affect the point, for this Imperial Conference Resolution was only adopted *after* ratification by Great Britain had occurred, and in any case it had no constitutional significance, since neither in connection with the Locarno Treaty nor in connection with the Straits Convention was any 'advice' given by the Dominion Governments to the King that they concurred in the acceptance by the British Government of the vitally important military obligations which were involved.

It must be concluded, therefore, that in respect of this third point Hall's constitutional convention is not yet clearly established. The maxims he lays down with regard to its working are sound political principles for the Governments to follow ; they are not yet statements of constitutional right. It may be held that they follow logically from the admission of equality of status, and that in the Locarno negotiations the Dominion Governments, while accepting no obligations themselves, did not object to what was done by Great Britain, which was all that the constitutional convention could reasonably be held to require. This, if it were accepted, would be a strange kind of constitutional convention on so grave a matter ; but even for this view we are still without the necessary evidence of clear and definite ideas in the minds of the Governments on the subject. Without the unquestioned general acceptance of such clear and definite ideas no convention can be held to be established.

The second question requiring discussion, 'What are "group questions"?' is even more obscure than the first. Hall himself admits that the distinction between what is 'national' and what is 'group' is difficult to draw. It is necessary, therefore, to look more closely at what he says.

'Among questions which may be regarded as group questions may be mentioned the making of war and of peace, the negotiation of important political treaties or conventions, and perhaps the annexation of territory.'<sup>1</sup>

Among questions 'which have been definitely recognised as national . . . may be mentioned trade relations (including tariffs and commercial treaties), immigration (including immigration agreements and conventions), copyright, naturalisation, merchant shipping, and the appointment of diplomatic agents.'<sup>1</sup>

But it is plain, as Hall himself points out, that this distinction is unstable. Immigration policy is a 'national' question; but nothing could more easily lead to a grave international dispute, in which war might well be threatened. In that case the issue would cease to be national and would become a 'group question.' And since the distinction is unstable, it is better to give up the attempt to make a list of categories of 'national' questions, which must be more or less misleading, and instead to concentrate attention on the characteristics of 'group questions' in the hope of finding among these characteristics something which is a *sine qua non* of every 'group question.' For if there is such a characteristic *sine qua non*, the problem will be solved; there will be a test for what constitutes a 'group question'; and everything that is not a 'group question' must obviously be 'national.' And here Hall is fortunately explicit. 'The essential character of group questions,' he says, 'is that action by the Crown in such matters cannot be taken for one Member of the group *without necessarily involving the others*.'<sup>2</sup> This definition, if it is capable of practical application, is obvious common sense; advice in such matters ought plainly to be common advice, just because

<sup>1</sup> *Op. cit.*, p. 243.

<sup>2</sup> *Op. cit.*, p. 248. (The italics are mine.)

all the Governments are 'necessarily involved' and have, therefore, whether they desire it or not, both an individual and a collective interest in what is done.

But is this definition in fact capable of such practical application? Does it furnish a concrete test by which it can be known what are and what are not 'group questions'? Certainly, at the moment when a given international question of any kind comes up for discussion, the test may prove to be as simple as possible in its working. Under the rules of the convention about 'consultation' each Government in the Commonwealth decides for itself whether its interests are involved. If in regard to the given question *all* the Governments declare that their interests are involved, then that question is a 'group question,' and must be dealt with by the Crown as such.

This is simple, but, it may be said, not very helpful. Surely there must be some way of so applying Hall's test that it can be determined in advance what kind of questions will, if they arise, 'necessarily involve' the interests of all the Governments of the Commonwealth? Surely in an organism like the Commonwealth, so closely bound together by the political and constitutional bonds above described, there must be common political interests of various determinable kinds which all the Governments must necessarily share?

This sounds reasonable, if not obvious; but none the less the practical application of the test to given categories of questions does not yield very satisfactory results.

On one category of questions only is it possible to give an immediate answer: namely, questions connected with the making of war. Keith wrote in 1916 that 'it is perfectly clear that in International Law the whole of the Empire is at war if the United

Kingdom is at war.'<sup>1</sup> Since then, in spite of the subsequent development of Dominion status, no responsible person has ventured to question that this proposition still remains true. On the contrary, the Prime Ministers of most, if not all, of the Dominions have specifically declared that it is.<sup>2</sup> They would perhaps now state the proposition rather differently, to make it conform to the requirements of 'equal status,' and would say that if any one part of the Empire is at war, then all the rest of the Empire is also automatically at war. This, as was said above, appears to be a necessary consequence in International Law of the fact of common allegiance,<sup>3</sup> and it follows that every question which concerns the making of war does 'necessarily involve' the interests of all the Members of the Commonwealth.

Thus 'group questions' must at least involve the following: the declaration of war; the termination of war (for unless all the Governments of the Commonwealth terminate war together, none can be at peace); general treaties of international guarantee against aggression (involving undertakings such as those of Article 16 of the Covenant); bilateral or group treaties for international guarantee against aggression (involving promises of military assistance such as those contained in the Locarno Pact).

Perhaps by a wider application of the words 'questions concerning the making of war,' there should also

<sup>1</sup> *Imperial Unity and the Dominions*, p. 339. *Vide* following pages for an important discussion of the question.

<sup>2</sup> Cf. speech by Mr. Mackenzie King on the Lausanne Treaty: 'When His Majesty the King declared war, Canada was brought into war as a consequence of the declaration; and when the King

ratifies the treaty, Canada will be brought out, just as she went into the war, by the action of the Sovereign *without any consultation with our Ministers in that regard.*' *Canadian Hansard*, vol. lix. p. 304c. (My italics.)

<sup>3</sup> Cf. *supra*, pp. 229-30. For a further discussion of automatic belligerency cf. also pp. 330 *et seqq.*, *infra*.

be included among 'group questions' general treaties involving undertakings not to go to war, such as the Covenant of the League, the unratified Geneva Protocol, the Kellogg Pact of 1928, and special treaties, *e.g.* all-inclusive arbitration treaties, which have the same purpose. It is to be noted that the British Government took this view of the Kellogg Pact during the negotiations of 1928.<sup>1</sup> It is not certain, however, that this precedent is decisive; for it is the fact of war, actual or contingent, which creates the unavoidable group interest which, for the present purpose, is required.

Is there any other category of international questions which can similarly be declared in advance to involve an inevitable group interest? Let us examine the list of categories which Hall suggests.

After 'the making of war and of peace,' he mentions 'the negotiation of important political treaties and conventions.' Again this appears to be an obvious category of 'group questions.' And in fact some such treaties have been dealt with as 'group questions'—the Treaty of Versailles and the Kellogg Pact of 1928 are examples. But others have not. Thus the Canadian Government refused to treat the Treaty of Lausanne as a group question—a political treaty of absolutely first-rate importance, involving serious commitments for the British Empire. As they were not invited to send a delegation to the Conference of Lausanne, they assumed that the British Government had decided that no Canadian interests were involved; they accepted this decision, but held that it would therefore be inappropriate for the Canadian Parliament to adopt any resolution approving the treaty or for the Canadian Government to draw up any Order in Council advising

<sup>1</sup> Cf. the language of their Note to the United States Government cited on p. 238, n. 3, *supra*, which makes it plain that they regarded it

as a 'group question' falling within the meaning of the phrases of the 1926 Report now being discussed.

the King to ratify it on behalf of Canada.<sup>1</sup> Not only so, but the Canadian Prime Minister took care to explain that he did not consider that Canada would be bound to co-operate in enforcing the Treaty of Lausanne, unless the Canadian Parliament decided, on the merits of the case when it arose, to do so. Thus he said :

'As to the extent of the obligations arising between different parts of the Empire—in other words, considered inter-Imperially—in the carrying out of its provisions, the Government take the position that it will be for this Parliament to decide what, should occasion arise, in the light of all the circumstances, and the light of the manner in which the treaty was negotiated, its obligations may be under the terms of the treaty.'<sup>2</sup>

He could not have said more plainly that he did not regard the obligations of the Treaty of Lausanne and the Straits Convention as a 'group question,' which would 'necessarily involve' all the Members of the Commonwealth. It may be that, in view of the nature of the Treaty of Lausanne and of the international guarantee contained in the Straits Convention by which it was accompanied, the decision taken by the Canadian Government was wrong. But at least it furnishes a noteworthy precedent against the view that all the Governments of the Commonwealth will always regard 'the making of an important political treaty' as a 'group question.'<sup>3</sup>

<sup>1</sup> Correspondence with the Canadian Government on the subject of the Peace Settlement with Turkey. Cmd. 2146 (1924).

<sup>2</sup> *Canadian Hansard*, vol. lix. p. 30.

<sup>3</sup> This argument applies, of course, only to those parts of the Treaty of Lausanne and the Straits Convention which imposed important political obligations of various kinds. In so far as the Treaty ended the state of war between the British Empire and Canada it was a 'group question': action by the Crown did necessarily

involve and bind Canada, and Mr. Mackenzie King specifically recognised the fact: 'Legally and technically Canada will be bound by the ratification of this Treaty; . . . speaking internationally . . . the whole British Empire . . . will stand as one. But . . . speaking of inter-Imperial obligations . . . this Parliament . . . will be in no way bound by any obligation beyond that which Parliament of its own volition recognises.' Cited by Lowell and Hall, 1927, p. 638.

It must be added that other cases can easily be conceived in which it might be much more reasonable than it was in the case of the Treaty of Lausanne for a Dominion Government to disinterest itself in a political treaty that might be of great importance to some other Member of the Commonwealth. There might, for example, be a treaty concerning the political settlement of Eastern Europe, which would be of vital interest to Great Britain, in its primary capacity of a European Power, but in which Australia or New Zealand might have an interest far less direct than that of any foreign state in Europe.<sup>1</sup> This being so, it is difficult to say that the making of important treaties must be regarded as a matter in which action by the Crown on behalf of one Government of the Commonwealth will always be held 'necessarily to involve' all the rest. It would rather appear that in some cases it will, in others it will not.

The same kind of reasoning applies to Hall's third category of 'group questions,' 'the annexation of territory.' When the King, on behalf of the British Government, ceded part of Somaliland to Italy in 1924, none of the Governments of the Commonwealth regarded it as a 'group question.'<sup>2</sup> Nor did they so regard the adjustment, in 1923, of the frontier in the East African mandated territories of Ruanda and Urundi. In neither of these cases was any 'advice' given to the Crown by any Dominion Government. Nor, indeed, is it reasonable to hold that the annexation of new territory in

<sup>1</sup> Cf. A. Lawrence Lowell, Lowell and Hall, 1927, p. 586: 'Great Britain is a world Power and also essentially a European nation. Her statesmen are constantly obliged to face, often not without anxiety, problems that arise among their Continental neighbours, and at the same time others in the Near East, in India, or in China. They must

consider how a course of conduct toward the Turks, for example, will affect the sentiments of Mohammedans in various parts of the Empire. But in most of these things the Dominions are little interested, for they are neither European nor world Powers.'

<sup>2</sup> Cf. *supra*, p. 260.

Africa or on the North-West Frontier of India need 'necessarily involve' the Government of Canada. The Government of Canada will have no responsibility of any kind for the administration of the territory after it has been annexed; why should it regard such annexation as a group question in which it is necessarily involved? Again, this is a category in which it will be decided on the merits of the questions as they arise whether they are or are not group questions.

This exhausts Hall's list of categories. Are there any other possible categories that need to be considered? Some are suggested by the last section of the Report of 1926, entitled 'Particular Aspects of Foreign Relations discussed by Committee.'<sup>1</sup> These 'particular aspects' were three in number:

(a) 'Compulsory Arbitration in International Disputes' (in fact, the question of 'acceptance of Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the Court');

(b) 'Adherence of the United States to the Protocol establishing the Permanent Court of International Justice';

(c) 'The Policy of Locarno.'

It is evident from the comments in the Report on each of these questions that the purpose of referring them to the Inter-Imperial Relations Committee was to secure agreement by all the Governments of the Commonwealth on the policy to be pursued.<sup>2</sup> In other

<sup>1</sup> Cmd. 2768, pp. 28-9.

<sup>2</sup> On Article 36 of the Statute of the Court the Report says: 'A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court

without bringing up the matter for further discussion.' On the policy of Locarno it says: 'It became clear that, from the standpoint of all the Dominions and India, there was complete approval of the manner in which the negotiations were conducted and brought to so successful a conclusion.'

words, there was a definite attempt to treat them as 'group questions.' Are they, in fact, questions in which action by the Crown on behalf of one Government of the Commonwealth must necessarily involve the rest?

The answer in regard to the third of them, the policy of Locarno, is clear. The policy of Locarno involved for Great Britain undertakings to engage in war of the most serious kind. In accordance with the principles discussed above, therefore, it was without doubt a 'group question.' It must be added, however, that the Locarno policy was not, in fact, treated as a group question proper. As explained above, the Locarno Pact was not drawn up in a form which 'rendered it binding upon all parts of the Empire'; on the contrary, the Dominions were expressly excluded from its operation. Nor was it 'ratified on behalf of all the Governments of the Empire'; on the contrary, the British Government is the only Government in the Commonwealth which has ratified it. It is true that the Dominions will, by their separate obligations under the Covenant, in almost all possible cases be involved in any war in which the Locarno Pact comes into play,<sup>1</sup> and that they did not object to its ratification by Great Britain. But these facts do not make it less true that the obligations of Locarno, perhaps the most serious and most onerous international political obligations which Great Britain has ever undertaken, were not treated as a group question. They do serve to show that in respect of this constitutional convention about group questions there are as yet neither a confirmed practice nor clear ideas.

But if the policy of Locarno should have been a true group question, what must be said of the other two points dealt with in the Report?

<sup>1</sup> Because under the Franco-German and Belgo-German Treaties of Arbitration the Permanent Court of International Justice is given

obligatory jurisdiction in all cases involving 'the rights of the parties,' and thus § 4 of Article 13 of the Covenant is brought into play.

The second, the proposed adherence of the United States to the Statute of the Permanent Court of International Justice, involved important considerations relative to the future development of the Court and of the functions of the Council of the League in international disputes. In that question, therefore, the Members of the Commonwealth in their capacity of equal and separate Members of the League had a common interest to ensure that the development of the Court and Council should be on the soundest possible lines. But it was a common interest which they shared with the other fifty Members of the League; there was no way in which it affected them specially as a group within the League; it is difficult to see, therefore, on what ground it should be regarded as a group question in which action by one Government of the Commonwealth necessarily involves the rest. It may be added that in other League 'constitutional' questions the Members of the Commonwealth have sometimes in the past followed different policies in the Assembly.

The remaining point, acceptance of the so-called 'optional clause,' is not so simple. It has been said above that treaties for the avoidance of war do not appear necessarily to be group questions. Certainly arbitration treaties are not held to be so, for at least one has been made by the British Government from the operation of which the Dominions have been specifically excluded.<sup>1</sup> Is there anything which makes the optional clause differ from an ordinary arbitration treaty in this respect?

The suggestion may perhaps be made that everything that relates to the settlement of international disputes

<sup>1</sup> Arbitration Convention between the United Kingdom and Siam, registered with the League of Nations on June 14, 1927. This appears to be the only new bilateral Arbitration Convention made by the British

Government since 1920. A number of older Arbitration Conventions, however, have been renewed without change, i.e. presumably they still apply to the Dominions. Cf. L.N. Document, C. 653, M. 216, 1927, v.

must be a 'group' matter, not because it may increase or diminish the risk of war, but because it is impossible to conceive any international dispute in which all parts of the Empire are not 'necessarily involved.' The Empire is a unit; every dispute with a foreign Power must involve all parts of that unit; there cannot be such a thing as a 'British' or a 'Canadian' international dispute—so runs the argument. A very distinguished Canadian Minister, Mr. Newton Rowell, in discussing this question of disputes, went so far as to use the following words in 1920:

'Canada owes allegiance to the same sovereign as Great Britain, and so long as she continues to do so she would be a party in the interest and disentitled to a vote. If she disclaimed the interest and claimed the right to vote, she would thereby proclaim her independence.'<sup>1</sup>

Is this argument sound? If it is, then no doubt the acceptance of the optional clause is a group question. But is it? At first sight there would seem to be no reason why, if there can be such a thing as a Dominion international agreement, the effect of which is confined to the Dominion concerned—and every one admits that there can be such agreements—there should not also be a Dominion international disagreement, the effect of which is similarly confined. The point will be argued in another connection later on,<sup>2</sup> and that is the conclusion which will then be reached. And if there can be such a thing as a Dominion international dispute, if every international dispute in which any Government of the Commonwealth is a party does not necessarily involve the rest, it would seem to follow that the optional clause could quite well be accepted by one Member of the Commonwealth for itself alone, and that the only common interest of the

<sup>1</sup> Speech on February 3, 1920, cited by Hall, *British Commonwealth of Nations*, p. 348.

<sup>2</sup> *Vide infra*, pp. 324 et seqq.

Members of the Commonwealth in the question is an interest which they also share with all the other Members of the League.

A little reflection will show that this is really so. If Great Britain accepted the clause, and Australia, for example, did not, Australia would no more be bound to go to the Court, and would no more be bound by its decisions, than if Great Britain had not accepted it. This would be equally true both when Great Britain was a party alone, and when both Australia and Great Britain were joint parties. If, however, it is believed that Australia and Great Britain are likely on many occasions to be joint parties to a dispute, then no doubt it is *desirable*, on grounds of convenience, that they should both accept it, if either does. But it is not essential. Nor is it even more desirable than it is that both France and Great Britain should have accepted it if they should chance to be joint parties in a dispute, as in fact it has often happened that they have been.<sup>1</sup>

It would seem, therefore, that the acceptance of the optional clause is not a 'group question' in which action by one Government of the Commonwealth necessarily involves the rest. This appears also to be the view of the Government of Canada, for on Feb. 19, 1929, Mr. Mackenzie King said in the Canadian House of Commons that: 'Canada had advised the other units of the Empire of her desire to sign it [the optional clause], and was at present receiving communications from them about it, but he would carry out his undertaking given at the last Conference not to sign until opportunity had been afforded for full discussion.'<sup>2</sup> This statement amounts to a declaration of the right of

<sup>1</sup> *E.g.* s.s. *Wimbledon* case, Danube Jurisdiction case, etc.

<sup>2</sup> *Times*, February 20, 1929. Cf. also previous declarations by members of the Canadian Cabinet in

favour of accepting the optional clause: *e.g.* M. Lapointe, *Times*, April 13, 1928; Senator Dandurand, *Records of the Eighth Assembly*, September 7, 1927, etc.

Canada, after full discussion, to sign the optional clause, whatever the other Governments may do ; and as such it clearly supports the conclusion reached above.

The results of this discussion may now be summed up.

First, any question which involves the making or ending of war is necessarily and always a group question.

Second, other kinds of questions—for example, the making of important political treaties, the annexation of territory, etc.—may be group questions, or may be treated as such, according to the particular circumstances in which any given question may arise.

Third, any kind of question, however ‘national’ in its origin, may become a group question if it leads to a situation in which there is a threat of war. For this reason, it is immensely important, if the unity of the Empire is to be preserved, that there should be close Commonwealth consultation on all questions involving international relations, and that, so far as possible, common principles of foreign policy should be agreed upon.

Fourth, the only kind of question which can certainly be said *in advance* to be a group question is the assumption, by treaty or otherwise, of any obligation to go to war. Thus treaties of security or guarantee, alliances and pacts of any kind, are group questions, because action with regard to them by one Member of the Commonwealth necessarily involves the rest.

This appears to be as near as it is possible to go to a definition of the matters to which Hall’s nascent constitutional convention about group questions can be applied. It is not very satisfactory even in theory, and moreover, as has been shown, theory is vitiated by the fact that the relevant practice has been conflicting and confused. It is not on that account of less importance. It is plain, indeed, that it involves one of the

chief political problems which the statesmen of the British Commonwealth may in future have to face, for serious disagreement in regard to true group questions might be fatal to the cohesion of the Empire. The warning of Sir Robert Borden with regard to the negotiation of the Locarno Pacts may perhaps be quoted :

‘ I have been sometimes not a little concerned by reason of commitments purporting to involve Great Britain alone, such as those imposed by the Anglo-American Guarantee Treaty of Paris and by the Locarno Treaty. I do not say this by way of criticism, because I realise the difficulties of the situation, and the momentous consequences depending upon some such course as that which was taken ; but these commitments are directly concerned with the ultimate issue of war. I am ready to believe that they may have been necessitated by considerations of the peace of Europe ; but I am confident they do not tend to the ultimate unity of the Commonwealth.’<sup>1</sup>

#### DO INTERNATIONAL TREATIES APPLY TO THE RELATIONS OF THE MEMBERS OF THE BRITISH COMMONWEALTH *INTER SE* ?

Another important problem which concerns both the international status of the Dominions and their constitutional relations with the other Members of the Commonwealth is dealt with in the Report of 1926, and is dealt with more fully and clearly than is that of the constitutional convention about ‘ group questions.’ It is this : do general or group international treaties, to which the various Members of the British Commonwealth are separate parties, apply to their mutual relations *inter se* ?

This question cannot be answered by simply pointing out that the Members of the Commonwealth are bound

<sup>1</sup> *Journal of the R.I.I.A.*, July 1927, p. 207.

together by the ties of constitutional law which have been described above, and that in consequence the rules of International Law do not apply to their relations. That is unquestionably true as a general proposition. But it may well be asked if that general proposition would prevail in the face of any extended contrary practice. If the Members of the Commonwealth were to sign a number of general international treaties as separate contracting parties; if in those treaties there were no indication that they were not to apply to *all* the parties equally in their relations *inter se*; if the Members of the Commonwealth actually applied them *inter se*—is it not at least possible that before long such treaties would come to be regarded both by the Dominions themselves and by foreign Powers as having binding legal force in International Law as among the Members of the Commonwealth? That there was doubt about the point is proved by the fact of the controversy between Great Britain and the Irish Free State in 1924, to which reference is made below.<sup>1</sup> That controversy alone justifies the special consideration of the application of international treaties, apart from the general question above discussed of the application of International Law to the relations of the Members of the Commonwealth *inter se*.

It was the fact of this difference of opinion between Great Britain and the Irish Free State in 1924 that led to its consideration by the Imperial Conference of 1926. The constitutional doctrine on the subject that was there unanimously accepted is stated in the following sentences of the Report:

‘The making of a treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be

<sup>1</sup> Cf. pp. 305-6 and pp. 319 *et seqq.*, *infra*.

regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to be applied. Where international agreements are to be applied between different parts of the Empire, the form of a treaty between Heads of States should be avoided.<sup>1</sup>

In these sentences, while most of what is said is clear, the reference to the Arms Traffic Conference is decidedly obscure, the more so since neither in the text nor in a footnote is there any citation of the Report in which the Legal Committee of that conference laid down its principle, nor even a reference to the parts of that Report on which the assertion of the Balfour Committee is founded. It is worth while, therefore, to reproduce here the essential sentences from that Report. They are as follows.

The delegation of the Netherlands had proposed the insertion in the Draft Arms Traffic Convention of the following Article :

*'The provisions of the present Convention shall not be interpreted as applying to the despatch of arms, munitions, and implements of war from and to territories forming part of or placed under the protection of one and the same sovereign state, or to their despatch from territory belonging*

<sup>1</sup> Cmd. 2768 (1926), p. 23.

*to one of the High Contracting Parties, for the use of its armed forces wherever they may be.'*<sup>1</sup>

The Report of the Sub-Committee which dealt with this proposal was as follows :

'The Sub-Committee, with the assistance of His Excellency M. van Troestwijk, considered the amendment proposed by the Dutch delegation. *The Sub-Committee, while considering it unnecessary to formulate an exact definition, were of the opinion that the general principle to which the Dutch amendment is directed underlies International Conventions.* . . . They were further unanimously of the opinion that this principle was applicable to the present Convention. Chapters III., IV., and V. are framed as an exception expressly to be agreed by the High Contracting Parties, and therefore rather tacitly affirm the principle than cast doubt upon it. In these circumstances the Sub-Committee came to the unanimous conclusion that it was not necessary to insert in the text of the present Convention any express affirmation of the principle, such as is the object of the Dutch amendment, and of this Report.'<sup>2</sup>

This language suggests the following commentary :

When the Dutch delegation drafted their amendment, they were apparently thinking of the despatch of arms between territories for which only one High Contracting Party would sign, *e.g.* from Holland to Dutch colonies abroad. This seemed to be the intention of their phrase, 'despatch of arms . . . from and to territories forming part of or placed under the protection of one and the same sovereign state.' They do not appear to have intended to cover the case of the British Commonwealth, *for the territories of which there were to be*

<sup>1</sup> Vide *Proceedings of the Conference for the Supervision of the International Trade in Arms*, L.N. Document, A. 13, 1923, ix.

p. 228. (The italics are mine.)

<sup>2</sup> *Proceedings*, p. 751. (The italics are mine.)

*several different High Contracting Parties.*<sup>1</sup> It is, indeed, quite possible to argue on the evidence furnished by the recorded Proceedings of the Conference that the Dutch amendment was intended deliberately to *exclude* the despatch of arms from the territory of one Member of the British Commonwealth which was a separate High Contracting Party to the territory of another such Member. For in moving his amendment in the Legal Committee the Dutch delegate said this :

‘ The Convention dealt only with the regulation of the international trade, and trade between two parts of one and the same State did not fall within this category. By the term “ international trade ” must be understood the transfer of arms and ammunition *from the possession of one political unit to that of another*. It had seemed to him advisable also to raise this point in view of Article 24 (British Amendment), as the text of this Article as adopted by the Legal Committee might still admit of some doubt, and as it might not be clearly understood that trade between two territories belonging to the same State would naturally remain outside the provisions of the Convention. Moreover, this was not the first time that the question of the unity of the different territories had been raised in connection with the application of a general Convention.

‘ The speaker quoted by way of example Articles 15 and 25 of the Barcelona Conventions on Freedom of Transit, and the Regime of Navigable Waterways, respectively, and Article 21 of the Convention relating to the Simplification of Customs Formalities.’<sup>2</sup>

The phrase ‘ political unit ’ was in the circumstances a curious one to choose for the purpose of defining ‘ international trade,’ and it may well be held that it was chosen deliberately to cover trade between all the separate High Contracting Parties, including the Dominions.

<sup>1</sup> In the preamble the Dominions are cited in the list of the H.C.P. as follows : ‘ . . . Brazil, the British Empire [meaning, as usual, Great

Britain, cf. p. 363, *infra*], Canada, the Irish Free State, and India, Bulgaria,’ etc.

<sup>2</sup> *Proceedings*, p. 604.

This view is supported by the fact that in the argument which has been quoted the Dutch delegate cited as a precedent Article 15 of the Barcelona Statute on Freedom of Transit. This Article reads as follows :

‘It is understood that this Statute must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part or placed under the protection of the same sovereign state, *whether or not these territories are individually Members of the League of Nations.*’<sup>1</sup>

It is to be particularly noted that in the draft Article which he proposed the Dutch delegate used the exact words of this Barcelona Article, ‘territories forming . . . part of the same sovereign state,’ but omitted any such phrase as that with which the Barcelona Article ends. From this it may again be argued that his intention was *not* to exclude from the operation of the Convention the despatch of arms from one Member of the British Commonwealth to another.<sup>2</sup>

The probability that this hypothesis is correct is increased by a debate which took place in the Legal Committee at the meeting previous to that at which the Dutch proposal was discussed. On this earlier occasion the British delegate also proposed an additional Article (at that stage numbered Article 24). It was in the following terms :

‘The provisions of this Convention are not to be interpreted as relating to :

‘(a) Arms, ammunition, or implements of war forwarded from the territory of a High Contracting Party for the use of its armed forces, wherever situated ; . . .’<sup>3</sup> etc.

<sup>1</sup> *League of Nations, Barcelona Conference* (Librairie Payot, 1921), p. 45. (My italics.)

<sup>2</sup> Cf. also Article 23 of the Statute on Maritime Ports, where the same

provision ends with this phrase : ‘whether or not these territories are *individually contracting states.*’

<sup>3</sup> *Proceedings*, p. 732.

In the discussion of this proposed new Article, the Japanese delegate enquired whether the Article was intended to apply to a consignment of arms sent from Great Britain to the Indian Army.<sup>1</sup> To this the British delegate replied in the affirmative, adding spontaneously that it would equally apply to arms purchased in Great Britain by the Australian or Canadian Governments for the Australian or Canadian armies. The United States delegate promptly pointed out that this 'would risk creating a grave situation of inequality, and permit *one of the contracting parties to make a purchase from another contracting party* without publicity.' (The italics are mine.) The Belgian delegate took the same point. He asked 'whether it was possible to accept the definition given by Mr. Beckett when he spoke of the oath of obedience taken by troops in the service of a Government which was in actual fact an autonomous Government. Would not this be exportation by one contracting party to another contracting party? He personally would interpret the English text as follows: a consignment of arms sent by the British Government to any portion of its land or naval forces, no matter where situated, should be outside the scope of the Convention, but a consignment sent to the Australian, Canadian, or New Zealand army was equivalent to one exported by one Power to another, and in such a case it would be quite within the spirit of the Convention to insist that all the formalities of exportation and publicity should be complied with.'<sup>2</sup>

The question of the applicability of the Arms Traffic Convention to the relations of the Members of the British Commonwealth *inter se* was therefore raised in a precise and definite manner in connection with this draft British Article 24, and divergent opinions were expressed

<sup>1</sup> For the Minutes of this discussion, vide *Proceedings*, p. 595.

<sup>2</sup> *Ibid.*

about it, foreign delegates showing powerful reasons why it was in their interest that the Convention should apply. It is therefore significant that, so far as the Minutes show, this difference of opinion was never cleared up either in subsequent discussion on this draft British Article (which ultimately became Article 32 of the Convention), or in the Report of the Legal Committee on the Dutch proposal. It is also significant that in its final form Article 32 read as follows :

‘ The High Contracting Parties agree that the provisions of the present Convention do not apply :

‘ (a) to arms or ammunition or to implements of war forwarded from territory under the sovereignty, jurisdiction, or tutelage of a High Contracting Party for the use of the armed forces of *such High Contracting Party*, wherever situated ; . . . ’ etc.<sup>1</sup> (My italics.)

Since the British delegate had never disputed that the Dominions were separate High Contracting Parties, the insertion in this final form of Article 32 of the words in italics plainly strengthens the case for the interpretation given by the Belgian delegate which is quoted above. Indeed, it is difficult to resist the conclusion that this interpretation was generally accepted, since no one questioned that the Dominions were separate High Contracting Parties, and therefore no one could maintain that the Canadian or Australian armies were, within the meaning of the Convention, part of the armed forces of Great Britain.

What is the result of this rather complicated discussion ? It appears to the present writer to be this :

First, the Dutch delegation in drafting their amendment seem to have assumed that the words ‘ territory of a High Contracting Party ’ are equivalent in meaning to the words ‘ territories forming part or placed under the protection of one and the same sovereign state.’

<sup>1</sup> *Proceedings*, p. 49.

Second, that in preparing their Report on the Dutch amendment the Legal Committee did nothing to clear up the doubt that might legitimately arise on this point, in view of the fact that the Dominions were recognised to be separate High Contracting Parties.

Third, that in their discussion of the British proposal quoted above, all the Legal Committee except the British delegate seem to have taken the view that the Dominions were separate High Contracting Parties, and that therefore the Convention ought to apply to the relations of the Members of the British Commonwealth *inter se*.

Fourth, that the change made in the drafting of the British proposal in its final form in Article 32 appears to support the suggestion that the British delegate gave way.

The author is far from confident that this interpretation of the Proceedings of the Arms Traffic Conference is correct; but if it is, the result in plain English would be this: that the British delegate had proposed to exclude the relations of the Members of the British Commonwealth *inter se* from the operation of the Convention; that foreign delegates on grounds of their national interest had resisted his proposal; and that, without formally renouncing his point of view, the British delegate accepted a text which the foreign delegates believed to give them satisfaction.

If this interpretation of the proceedings be correct, it leads on to a further remarkable result. As argued above, the Report of the Legal Committee on the Dutch amendment appears to be based on the assumption that the words 'territory of a High Contracting Party' are equivalent in meaning to the words 'territories forming part of or placed under the protection of one and the same sovereign state,' *i.e.* on the assumption that every separate High Contracting Party will be a 'sovereign state.' But the use made of this Report in the Imperial Conference Report of 1926 is based on *exactly the opposite*

*assumption*, namely, that the Dominions, which signed as separate High Contracting Parties, are nevertheless parts of a single sovereign state.

This fact and the other facts revealed by the discussions of the Arms Traffic Conference throw a strange light on the reference made to its Legal Committee's Report by the Balfour Committee, and it is necessary for the proper understanding of the points involved to investigate the circumstances of this reference a little more.

Why, then, was the reference made? The answer, it would seem, is this: because the authors of the Report of 1926 desired to quote the opinion of an International Conference to the effect that it is 'a principle which underlies all international conventions' that the terms of such conventions do not apply as between 'territories forming part of . . . one and the same sovereign state.' They desired this, because, as will appear later, they desired—or some of them desired—to secure the official recognition of two propositions: first, that all the Members of the British Commonwealth are still to be regarded as 'parts of one and the same sovereign state'; and second, that no international convention, whether made after or before the Imperial Conference of 1926, whether made in the name of the King or otherwise, is to be held to apply to the relations of the Members of the Commonwealth *inter se*. Some of them desired this because of the controversy which, as said above, had previously arisen concerning the application of a specific international convention to the relations of Members of the Commonwealth, namely, the Covenant of the League of Nations.<sup>1</sup>

But if this was their purpose, they did not take a very direct method of securing their end. It may very well be that, in spite of the separate international rights and obligations they have assumed, the Members of the

<sup>1</sup> Cf. *infra*, pp. 305 *et seqq.*

Commonwealth are still, for *all* purposes of International Law, 'parts of one and the same sovereign state.' Sir Cecil Hurst, although he avoids the use of the word 'state,' appears substantially to hold this view. Writing of the passage in the Report of 1926 now being discussed, he speaks of Great Britain and the Dominions as 'territories subject to the same sovereignty,' and he goes on to say :

'If I may put the matter in one short sentence, I would say that the common allegiance to the Crown prevents the relations between the different communities of the Empire being international relations.'<sup>1</sup>

✓It may also be a necessary result from this fact that no international treaty can by its very nature apply to the relations of the Members of the Commonwealth *inter se*. This is a possible deduction from the language used by Sir Cecil Hurst. But if that is the case, if that is what the authors of the Report of 1926 intended, why did they not say so? Why did they not further proceed to the obvious conclusion that follows, and lay it down in plain terms that the various Members of the Commonwealth can each contract with foreign Powers by the same international instrument, but that if they want to contract for the rules contained in that instrument to be applied among themselves they must do so by a separate and supplementary instrument, different in legal character because it would be confined to the Members of the Commonwealth among themselves? Why, so far from doing anything like this, did the Report do the exact opposite of it?

For what are the specific rules concerning the application of international treaties and agreements to inter-Commonwealth relations contained in the sentences of

<sup>1</sup> *Op. cit.*, pp. 54-5.

the Report of 1926 now being discussed? They are as follows:

1. 'It is recommended' that international treaties to which Members of the Commonwealth are parties 'should be made in the name of the King.'

2. When they are made in the name of the King they 'must not be regarded as regulating *inter se* the rights and obligations' of the Members of the Commonwealth.

3. If the Governments of the Members of the Commonwealth desire to apply some of the provisions of 'international agreements' between themselves, they may do so 'as an administrative measure.' 'In this case they should state the extent to which and the terms on which such provisions are to apply.' (It is not clear from this sentence of the Report whether it is the 'agreements' or the 'Governments' which are to make this statement, but it may be presumed that it is the agreements.)

4. Complete international agreements can be applied between different Members of the Commonwealth, but if this is done, or even if some provisions only are to be so applied, 'the form of a treaty between Heads of States should be avoided.' Presumably also complete treaties can only be applied 'as an administrative measure,' since it seems right to assume that the first two sentences of the second paragraph quoted on page 291 above from the Report of 1926 are intended to govern the third.

It will be observed that in Rules 3 and 4, where it is provided that some parts or the whole of international instruments may be applied to inter-Commonwealth relations, the word 'treaty' is avoided, the words 'international agreement' being used instead.<sup>1</sup> Is this subtle distinction intended to imply that an instrument made not in the name of the Heads of States but in the name of the contracting countries is not a true treaty

<sup>1</sup> Keith asserts that the meaning of this language is 'doubtless that the agreements should be framed as mere governmental accords.' *Respon-*

*sible Government*, 1928 ed., ii. p. 911. There appears to be no obvious justification for this assumption, which in any case begs the question.

in International Law? It is true that there is a kind of informal 'international agreement' sometimes made by Dominions in the past, which has not been held to require formal ratification. Although such an agreement was always held to be a binding instrument in International Law, it might nevertheless possibly be described as something less than a treaty proper.<sup>1</sup> But there is nothing in Rules 3 and 4 above to show that their effect is to be restricted to 'agreements' of that class, still less to show that every international instrument drawn up in the name of the contracting countries is not a treaty proper, but an 'agreement.' If it were so, it would mean that neither the Treaty of Versailles nor the Arms Traffic Convention above discussed was a treaty proper, which we can hardly assume to be intended. It is indeed certain that there is no distinction to be made between the binding force and general character in International Law of treaties made in the name of Heads of States and the binding force and general character of treaties made in the names of countries. Rules 3 and 4, therefore, apply to all treaties proper, whatever their form.

This preliminary point being settled, what, it must next be asked, is the real effect of these new rules on the question whether international treaties shall apply to the relations *inter se* of Members of the British Commonwealth who sign them as separate High Contracting Parties?

First, the rules are certainly intended as a declaration that international treaties are not in principle to be regarded as applying to these relations. Though unfortunately this declaration is in some ways obscure, particularly in view of the ambiguous proceedings of the Arms Traffic Conference on which it is founded, it is

<sup>1</sup> But cf. p. 181, *supra*, for the views of Smith and Corbett.

clear and solemn enough to justify the assertion that there is a new agreed constitutional convention which will prevent the Government of any Member of the Commonwealth claiming that any future treaty applies to its relations with another Member, unless the conditions which the Rules lay down have been fulfilled.

But, second, there is no absolute universal rule that no international instrument binding in International Law shall regulate the relations of Members of the Commonwealth *inter se*. On the contrary, it is expressly provided that, if they are drawn up in a certain form and if proper explanations are made, such instruments may apply to the relations *inter se* of Members of the Commonwealth who have signed them.

In other words, the constitutional relation between Members of the Commonwealth does *not* render it impossible for their relations *inter se* to be determined by an ordinary international treaty binding in International Law.

But, third, it is further provided that if a treaty is accepted by Members of the Commonwealth as regulating their relations *inter se*, it shall be accepted 'as an administrative measure.' This phrase leaves something to be desired in the way of clarity, but presumably it is intended to mean that they are *not* to be accepted as binding in International Law, but merely as administrative arrangements accepted by the free volition of the Commonwealth Governments concerned, because it happens to be convenient to these Governments to accept them. This interpretation may be disputed, but it is difficult to see what reasonable alternative can be found.

The view that is taken of the constitutional doctrine established by the Report will depend on the interpretation that is given to this phrase 'as an administrative measure.' If it is agreed, as above suggested,

that it must be read to mean that the obligations so assumed by Members of the Commonwealth have no binding character *in International Law*; if, that is to say, it is agreed that it is intended to exclude International Law from governing the relations of Members of the Commonwealth, even when these Members apply as among themselves an international treaty to which, with other foreign Powers, they are contracting parties—then it follows that the doctrine established by the Report is that *no* international treaty of any kind is to be held to apply *by International Law* to the relations of the Members of the Commonwealth *inter se*.

And this, it is submitted, is the right conclusion. For, in spite of the rather unsatisfactory character of the Report of the Legal Committee and of the other proceedings of the Arms Traffic Conference above discussed, it is nevertheless true that that Report does constitute a formal declaration that it is a generally accepted principle that international treaties do not apply to the relations of different 'territories forming part of or placed under the protection of one and the same sovereign state'; and it cannot be doubted that the paragraphs of the Balfour Report cited on pp. 290-1 above are intended to apply this principle to the relations of the different Members of the Commonwealth. This conclusion is supported by the following remarkable speech made by the Irish Minister of External Affairs on December 15, 1926 :

'There is a special bond between the states of the Commonwealth consisting not in a supreme governmental authority, but in a common King. The exact nature of the relationship outside the common bond of the King is undefined, but it is naturally felt that the League treaties and conventions cannot be taken as applying completely—as to all their articles—between them, as if there was no special relationship whatever. They accord to each other

mutual privileges and mutual rights which might easily be disturbed *if there was not a general understanding that these treaties and conventions apply among themselves only when special agreements are made between them for that purpose.* No *inter se* clause will in future be inserted in League documents. Nothing on the face of any international instrument will leave room for any other interpretation of their special relationship than that they are under the same King acting in a several capacity.'<sup>1</sup>

This speech is a plain recantation of the view put forward in 1924 by the Irish Government, and it would appear, therefore, that there was real unanimity in the Imperial Conference of 1926 in favour of the constitutional doctrine that international treaties cannot apply with binding force in International Law to the relations of the Members of the Commonwealth *inter se*.

If this conclusion is accepted, how can the difficulties caused by the language of the Balfour Report be explained? The answer would seem to be as follows:

First, the obscurity of the reference to the Arms Traffic Conference Report was intentional. It was necessary in 1926 to 'save the face' of the Irish Government, who were surrendering a position they had warmly defended before. Therefore the Balfour Committee chose the most complicated possible method of saying what could have been said in much plainer language and in fewer words.

Second, it was for reasons of simple convenience that the Report did not categorically provide that the Members of the Commonwealth, if they desired to apply the provisions of an international treaty *inter se*, must do so by making a separate instrument of their own. If the Governments of the Commonwealth are in fact

<sup>1</sup> *Irish Parliamentary Debates*, December 15. Cited in Lowell and Hall, p. 689. (My italics.)

separate parties to a treaty, and desire to apply its provisions *inter se*, it would seem an obvious waste of effort to make a separate additional instrument of their own.

In conclusion, it must be said that this is a point in which future practice will be of great importance, and on which it may be that, as the result of practice, the relations of the Members of the Commonwealth will gradually tend to become 'international.' It will therefore be of great interest to observe how the new constitutional convention above described will in practice be applied.<sup>1</sup>

#### DOES THE COVENANT OF THE LEAGUE OF NATIONS APPLY TO THE RELATIONS OF THE MEMBERS OF THE BRITISH COMMONWEALTH *INTER SE* ?

The most important political example of the problem just discussed is the question whether the Covenant of the League of Nations applies to the relations of the Members of the British Commonwealth *inter se*. It is the most important because, as mentioned above, it gave rise in 1924 to a notable dispute between the Governments of two Members of the Commonwealth on the point. Since it is possible, even if now improbable, that a similar controversy between two Members of the Commonwealth may arise on some other occasion in future, it is worth while to say something of the difficult questions which the case involved.

The facts of the case were as follows: On July 11, 1924, the Government of the Irish Free State registered

<sup>1</sup> In fact, the practice up to the time of going to press (March 1929) appears to be mixed. The Conventions of the I.L.O. continue to be made as before in the form of Draft Conventions adopted by the General Conference, and having therefore in the Preamble no citation of the Contracting Parties, whether by names of Heads of States or of Countries.

Other Conventions—*e.g.* Convention for the Abolition of Import and Export Prohibitions, 1927; Convention on Arbitration Clauses in Commercial Matters, 1927; Convention to Establish an International Relief Union, 1927—have been drawn up in the new form prescribed by the Report of 1927 and in the name of the Heads of States.

with the Secretary-General of the League of Nations the Articles of Agreement between the British Government and the Irish Nationalist leaders concluded on December 6, 1921, and commonly known as the 'Irish Treaty.'<sup>1</sup> Having no right under Article 18 of the Covenant<sup>2</sup> to inquire into the nature of the instrument submitted for registration, the Secretary-General duly registered the 'treaty.' The British Government thereupon addressed a Note to the Secretary-General, dated November 27, 1924, and couched in the following terms :

'Since the Covenant of the League of Nations came into force His Majesty's Government have consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern the relations *inter se* of the various parts of the British Commonwealth. His Majesty's Government consider, therefore, that the terms of Article 18 of the Covenant are not applicable to the Articles of Agreement of 6th December 1921.'<sup>3</sup>

To this Note the Irish Free State Government replied with another in which it categorically rejected the British contention that the Covenant did not apply equally to the relations of all the separate Members of the League *inter se*, and maintained accordingly that they were bound under Article 18 to register the 'treaty' of December 6, 1921.<sup>4</sup> These Notes were both regis-

<sup>1</sup> *L.N. Treaty Series*, xxvi. p. 10.

<sup>2</sup> Article 18 is as follows: 'Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.'

<sup>3</sup> This Note was registered by the Secretary-General, and appears in *L.N. Series*, xxvii., at p. 449.

<sup>4</sup> Note of December 18, 1924. It reads in part as follows: 'The

obligations contained in Article 18 are in their opinion imposed in the most specific terms on every Member of the League, and they are unable to accept the contention that the clear and unequivocal language of that Article is susceptible of any interpretation compatible with the limitation which the British Government now seek to read into it.' *Ibid.*, p. 450. Cf. also an important declaration by the Irish Minister for External Affairs, cited by Toynbee, *op. cit.*, p. 55.

tered and published by the Secretary-General; no agreement was reached, and the matter rested there until the meeting of the Imperial Conference in 1926, the results of which have already been discussed.

The above facts are cited merely to show that the controversy was one in which the two Governments were diametrically opposed in their views on the question now being discussed. But they do not in themselves furnish a very satisfactory example on the basis of which the general problem of inter-Commonwealth relations under the Covenant can be discussed, for the reason that the controversy related to an agreement between two Commonwealth Governments, and therefore involved a preliminary question as to whether any such agreement can be held to be an 'international engagement' in the sense of Article 18. This preliminary question will be discussed a little later on. For the present purpose of considering, in the light of the Report of 1926, whether the Covenant could be held to apply to the relations of the Commonwealth Governments *inter se*, it is better to take the imaginary case of a dispute between two Members of the Commonwealth, and to inquire whether such a dispute could properly be dealt with either by the Permanent Court of International Justice or by the Council of the League under Articles 12-15 of the Covenant. It may be remarked that although such a dispute has not yet actually come before any organ of the League, eminent authorities have seriously considered the possibility that this might occur. Nor are they wholly unsupported in this view by the history of Dominion action both in and outside the League. In 1922 Mr. Sastri, as delegate from India, raised in a general speech to the Assembly the dispute between India and the Union of South Africa concerning the rights of Indians domiciled in the Union, though, in fact, he did so without

asking for any specific action by the League.<sup>1</sup> It was firmly believed at a later date that the Irish Free State Government was contemplating laying its Northern Boundary dispute with Northern Ireland before the Council. For the purpose of the present discussion it will be better to assume a most improbable example, say a dispute between Canada and New Zealand. Could such a dispute properly be dealt with by the Council or the Court? <sup>2</sup>

First, it must be recalled that the Dominions are Members of the League in their own name and right, by virtue of their own act and signature, and that they are separate Members with rights and obligations equal in every particular to those of all the other Members of the League.<sup>3</sup>

It follows from that that if Canada and New Zealand were in agreement to lay their dispute before the Council, no foreign Member of the League could have any right to object. If the Members of the Commonwealth desire to apply the Covenant to their mutual relations, they are free to do so, for there is absolutely nothing in the constitution of the League to prevent them.

Second, they are equally free to agree *not* to do so, provided that they do nothing that is inconsistent with the Covenant. If Canada and New Zealand agreed to settle their dispute by other peaceful means, no foreign Member could have any ground to complain, provided that they did not resort to war or commit some other breach of their obligations under the Covenant.<sup>4</sup> The

<sup>1</sup> On this episode Keith has written: 'Of special interest is the fact that disputes between different parts of the Empire can thus be brought to the cognisance of the League.' He then goes on to point out that Mr. Sastri obtained public assurances of an important kind from the South African delegates in the Assembly. But of course

Mr. Sastri did not raise the matter as a formal dispute under either Article 11 or Article 15. *Vide* Keith, *Constitution, Administration, and Laws of the Empire*, p. 51.

<sup>2</sup> *Vide* Keith, *Responsible Government*, 1928 ed., ii. pp. 888-9.

<sup>3</sup> *Of. supra*, pp. 81-3.

<sup>4</sup> It is doubtful whether the phrase 'resort to war' can be legitimately

Covenant specifically provides by Article 21 that Members of the League may settle their disputes under arbitration treaties without recourse to the machinery of the League. This would amply cover the case of such a New Zealand-Canadian agreement.

But, third, suppose that Canada desired to take the dispute to the Council and New Zealand refused, what would happen then? In fact it is happily most improbable that both sides would insist on their point of view. The nature and atmosphere of Commonwealth relations are such that agreement on one or other course would almost certainly be achieved. But suppose that *per impossibile* both parties did insist; that no agreement was reached, and that Canada nevertheless exercised the right it claimed under Article 15 to place the dispute on the agenda of the Council—what would happen?

First, the Council would clearly be obliged to agree that the matter should be placed on its agenda. It would have no possible ground on which it could refuse.

Second, it would clearly be obliged to hear the statements of the parties on the question. Article 15 says plainly: 'If there should arise between Members of the League any dispute likely to lead to a rupture . . . the Members agree that they will submit the matter to the Council.' It does not say 'any *international* dispute between Members of the League'; it says 'any dispute.' It does not say any dispute between '*states* Members of the League'; the word '*states*' was struck out of the

applied, as in the text, to coercive action by one Dominion against another, for such coercive action would not be 'war' in International Law. In any case, the use of the phrase in the text begs the question now under discussion, for it assumes that the Covenant *does* apply to the relations of the Dominions *inter se*.

It is possible, however, that if coercive action by one Dominion against another did occur, foreign Members of the League would attempt in virtue of the Covenant to intervene. The phrase, although inaccurate, is left as it stands in the text in order to call attention to this point.

first draft of the Covenant precisely because the Dominions were to be equal Members.<sup>1</sup> The Article provides later that: 'The Council *shall* endeavour to effect a settlement of the dispute.' There is therefore nothing in the Covenant that would justify the Council in refusing a hearing to the Canadian plaintiff.

But, third, could the Council take any definite action with regard to the dispute? Could it make a specific recommendation with regard to its settlement, as it would in a dispute between two ordinary Members of the League?

It would plainly be the task of the New Zealand delegate to show reason why the Council should not take any action with regard to the dispute or its settlement, and it may be assumed that he would plead that the dispute was outside the Council's competence. He would contend, no doubt, that the Members of the Commonwealth are bound by ties of constitutional law, and that therefore the Covenant, which is International Law, could not apply to their relations. In support of this contention he might use various arguments:

First, he might claim that Article 15 can only be applied by the Council when there is 'a dispute likely to lead to a rupture,' and he might ask the question, 'A rupture of what?' and answer it by claiming that it must plainly mean 'A rupture of international relations.' Then he would argue that between two Dominions there cannot be 'international relations,' and that in consequence there cannot be a 'rupture' of the kind envisaged in Article 15.

It is doubtful whether the Council would be convinced by this argument. Article 15 does not say 'a rupture of international relations,' it says 'a rupture'; and a

<sup>1</sup> Cf. *supra*, pp. 81-3. For the history of these changes, *vide* D. H. Miller, *The Drafting of the Covenant*, i. p. 284 and pp. 477 *et seqq.*

more straightforward answer to the question, 'A rupture of what?' would appear to be: 'A rupture of whatever relations previously existed between the parties.' Moreover, it must be remembered that the Committee of Jurists appointed to investigate certain legal questions which arose out of the Corfu dispute between Italy and Greece expressed the following opinion, which is relevant to the present point:

'The Council, when seized, at the instance of a Member of the League of Nations, of a dispute submitted in accordance with the terms of Article 15 of the Covenant by such a Member as "likely to lead to a rupture," is not bound, either at the request of the other party or on its own authority, and before enquiring into any point, to decide whether in fact such description is well founded.'<sup>1</sup>

In view of this authoritative opinion, it is not probable that the Council would admit this first contention.

There are, however, three other arguments which the New Zealand delegate might use, two of which have been put forward by writers on the subject.

First, he might argue, as do Smith and Corbett,<sup>2</sup> that the grouping of the Commonwealth signatures on the Treaty of Versailles, and the arrangement of their names in the listing of the original Members of the League in the Annex to the Covenant, prove that they entered the League as Members of a single constitutional unit, between whom the existing constitutional relations were to be preserved.<sup>3</sup> And from this fact he would argue that all the foreign Members of the

<sup>1</sup> *Report of the Secretary-General to the Fifth Assembly*, L.N. Document, A. 8, 1924, p. 9.

<sup>2</sup> Vide *Canada and World Politics*, pp. 112-16; cf. also *supra*, pp. 79-80.

<sup>3</sup> The Commonwealth Members of the League are listed not in their alphabetical order in the Annex to

the Covenant of the League, but as follows:

- British Empire.
- Canada.
- Australia.
- New Zealand.
- South Africa.
- India.

League had recognised that the constitutional relations of the Commonwealth Members would continue, and would therefore be bound to recognise that the League was not competent to deal with the dispute.

On this argument it may be admitted that the grouping of the signatures and the typographical arrangement of the Annex to the Covenant must have some legal significance; and if so, their only reasonable meaning is that they indicate that the Members of the League whose signatures are grouped are bound by a special relation of constitutional law. And in permitting this grouping of signatures the foreign Members of the League have no doubt recognised the subsistence of the constitutional relation. But does it necessarily follow that because the constitutional relation subsists, the Covenant cannot apply to the relations of the Members whose signatures are grouped? Is this not placing an altogether extravagant interpretation upon a mere typographical arrangement? When there is nothing else said upon the subject in the Covenant; when there is no hint that its terms are not to apply equally to all the Members and in all circumstances; when, on the contrary, everything in the Covenant points the other way—can it be held that a mere grouping of signatures should have this tremendously important effect? The truth is that by itself this argument begs the question. The grouping of signatures does show that the constitutional relationship subsists; it does nothing to show that that constitutional relationship is inconsistent with the application of the Covenant to inter-Commonwealth relations.

Second, the New Zealand delegate might argue that Article 1 of the Covenant 'expressly provides for the Membership of Dominions and Colonies, entities which by definition are constitutionally related to the Motherland. Membership, therefore, cannot be understood as

implying any obligation essentially incompatible with the constitutional relation.' <sup>1</sup> And he might complete his syllogism by arguing that the constitutional relation is inconsistent with the application of the Covenant as between the Members so related.

But, again, if he did so he would beg the question. The point about Article 1 is most important, but it does nothing to show that the constitutional relation is inconsistent with the application of the Covenant. Indeed, it might equally be used in exactly the opposite sense to that suggested above, viz. to the effect that Dominions or Colonies admitted to the League are thereby recognised to have the benefits of the Covenant in their relations with their mother-countries.

The truth is that the two arguments above are useful evidence of the fact that the constitutional relation among the Members of the Commonwealth has been recognised as still subsisting, and they are no more than that. The only arguments that can apply to the main question must be arguments drawn not from the Covenant—there is really no relevant evidence there at all—but from British constitutional law. Is it plain that by British constitutional law and practice the Covenant cannot apply to inter-Commonwealth relations? That is the real point at issue.

It is certain that there is nothing in British statutory law applicable to the relations of the Dominions and the Mother-country in the new situation created by the admission of the Dominions as equal and separate Members of the League. Likewise, there is no practice except the doubtful precedent of the British-Irish controversy of 1924. There is nothing, in fact, but the new constitutional convention laid down in the Report of 1926, which was exhaustively discussed in the preceding section. If the New Zealand delegate pleaded

<sup>1</sup> Smith and Corbett, *Canada and World Politics*, p. 117.

this constitutional convention, would the Council have to accept his plea as finally decisive?

The answer to this question is not obvious. If all the Members of the Commonwealth agreed that the new constitutional convention excluded the application of the Covenant to their relations, then no doubt the Council would accept their evidence as decisive. But *ex hypothesi*, in the case supposed Canada would not agree to any such contention. And if Canada insisted that the new convention did *not* apply to the Covenant, if she argued that there is no mention of the Covenant in the relevant passages of the Report of 1926, that by the plain terms of the Covenant all the Members of the League have equal rights and obligations, it is difficult to see what the Council could do except admit her argument and proceed to deal with her dispute. It could hardly be within the competence of the Council or of the Permanent Court to settle a point in British constitutional practice as to which two Members of the Commonwealth were in open dispute. But if they could not settle that point *against* the Canadian contention, if they could not agree that the new constitutional convention must, in spite of Canada's opposition, be applied and accepted as decisive, they would, so it appears to the present writer, have no option but to apply the Covenant in accordance with the Canadian request.

It must be added that even if the Council or the Court agreed to apply the new constitutional convention exactly as it is stated in the 1926 Report, Canada could still make at least a presentable paper case for the view that its rules,<sup>1</sup> if faithfully applied, would not exclude the application of the Covenant to the relations of the Members of the Commonwealth *inter se*. For the Covenant is clearly a treaty of the kind which the

<sup>1</sup> Cf. pp. 299-303, *supra*.

Members of the Commonwealth are free to apply among themselves 'as an administrative measure' if they so desire. For the Covenant is the first part of the Treaty of Versailles; the Treaty of Versailles was made, not in the names of Heads of States, but in the names of the contracting countries. The Dominions signed as separate parties.<sup>1</sup> Moreover, there is nothing whatever in the Covenant from the first line to the last to indicate the 'extent to which and the terms on which' its provisions are to apply to the relations of the Members of the Commonwealth; nothing, that is to say, to show that there are any limitations of any kind on its application. On the contrary, as already said, the Covenant everywhere speaks of Members of the League without distinction, and contains no hint that the whole of its provisions are not to apply generally to the mutual relations of them all.

Even if the new constitutional convention of 1926 were admitted as a general proposition applicable to all treaties, therefore, it is not certain that its terms would be so interpreted as to exclude the application of the Covenant to inter-Commonwealth relations. But whether the Council or the Court could insist on applying a treaty that had been accepted not as International Law but 'as an administrative measure,' is another point on which the answer is not entirely clear.

Apart from these two pleas of the grouped signatures and the new constitutional convention, there is only one other argument, so far as the present writer can see, which the New Zealand delegate could possibly advance. It is drawn from paragraph 8 of Article 15, which reads:

'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by International Law is solely within the

<sup>1</sup> Cf. pp. 67-82, *supra*.

domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement.'

The Council would be obliged to examine this contention first, if it were put forward, and it might either do so itself or it might take the advisory opinion of the Permanent Court. How, under either procedure, could the provisions of paragraph 8 of Article 15 about domestic jurisdiction be applied to our imaginary New Zealand-Canadian dispute?

Presumably the New Zealand contention would be that within the British Commonwealth there is only one single jurisdiction, that of the Imperial Crown; and that, accordingly, any dispute arising, even 'between separate and autonomous Governments which are separate Members of the League, must be, if those Governments operate within the jurisdiction of the Crown, a matter of exclusively domestic concern.

This is to make 'domestic jurisdiction' mean identically the same thing in International Law as 'common allegiance.' This may be right; and if they decided that it was right, then certainly neither the Council nor the Court could take further cognisance of the New Zealand-Canadian dispute.

But it must be said that if paragraph 8 of Article 15 leads to this result, it is a result produced by accident. The purpose of the paragraph was not to lay down any rule or doctrine of any kind about the relations of Members of the League who happen to have the same allegiance in International Law. On the contrary, it was a clause of *general application* designed to achieve the wholly different purpose of preventing the Council from dealing with disputes arising out of questions like immigration laws, customs tariffs, and so on, in which, by International Law, Governments have

hitherto been sole judges of their actions, owing no duties of any kind to other states.

It must also be said that to hold that 'domestic jurisdiction' has identically the same meaning as 'allegiance' is, at the best, to place a highly technical meaning on the word 'jurisdiction.' New Zealand and Canada have a common allegiance; in what real sense of the word have they a common jurisdiction? The Canadian Government is impotent to effect anything of any kind on New Zealand territory, and *vice versa*. The Crown has in a sense a common jurisdiction in the territory of both, but that does not mean that there is a superior authority acknowledged by the Governments of both which can enforce its will, and which, for example, has the right to settle their dispute. Indeed, it must be admitted that in the primary sense in which the word 'jurisdiction' is used in paragraph 8 of Article 15, namely, that of giving exclusive control over such subjects as tariffs or immigration laws to a national Government, the Canadian Government has an absolutely complete jurisdiction of its own, in which neither the British nor any other Commonwealth Government has any share at all.<sup>1</sup>

But the present author does not presume to say whether or not these considerations would be held to be decisive by the Council or the Permanent Court. His purpose is not dogmatically to put forward any answer to the question just discussed. He is content to set out the arguments which the Council, in his imaginary case, had it happened in 1924, would have been called upon to hear.

As a final reflection on the not very satisfactory discussion above, it may be added that the arguments adduced make it possible to maintain that the Irish Free

<sup>1</sup> Reference should also be made to an ingenious argument by Mr. Phelan, 'The Sovereignty of the Irish Free State,' *The Review of Nations*, March 1927, pp. 47-8.

State Government might have consistently accepted the Report of 1926 without necessarily abandoning the whole of its contention of 1924. Both for this reason and on general grounds, it is conceivable that this question of the application of the Covenant to the relations of Members of the British Commonwealth *inter se* has not been finally disposed of by the Report of 1926. At the same time, it must be added that the remarkable improvement in the atmosphere of Commonwealth relations since the adoption of the Report, together with the progressive improvement now going on in the collective institutional organisation of the Commonwealth, makes it increasingly improbable that the question will again be brought to a practical test.

Perhaps a concluding political reflection may also be allowed. If, which may God avert, the case imagined should actually arise and one Member of the Commonwealth should resolutely insist on taking a dispute with another Member before the Council of the League, by far the least dangerous course to be pursued, and the course best calculated to avert the evident risk of secession which would then arise, might well be to allow the machinery of the League to take its normal course.<sup>1</sup>

There are several other problems relating to the application of the Covenant to the relations of the Members of the British Commonwealth in which there are special factors to be considered, and which for that reason are not wholly disposed of by what has been said above. They may be dealt with briefly one by one.

<sup>1</sup> Cf. these observations by Keith: 'There does not yet exist any other recognised manner' (excepting through the League) 'of submitting to impartial decision issues arising between parts of the Empire, though

in the Privy Council there exists the nucleus of an Imperial Arbitral Tribunal in the Judicial Committee.' *Constitution, Administration, and Laws of the Empire*, p. 52.

DOUGHT AGREEMENTS BETWEEN MEMBERS OF THE  
BRITISH COMMONWEALTH TO BE REGISTERED AS  
INTERNATIONAL TREATIES OR ENGAGEMENTS UNDER  
ARTICLE 18 ?

The first of these problems is the problem, already referred to, which caused the disagreement in 1924 between the Governments of Great Britain and the Irish Free State, namely, whether an agreement between two Members of the Commonwealth is an international engagement which should be registered under Article 18.

The first point to be made with regard to this problem is that the case of the so-called 'Irish Treaty' was in no sense a normal precedent. Its proper title is as follows: 'Articles of Agreement for a Treaty between Great Britain and Ireland.' No subsequent document labelled 'Treaty' was ever drawn up or signed, but, as Phelan has shown, this is not in itself a conclusive argument against the view that the Articles of Agreement were themselves a treaty proper.<sup>1</sup> The true character in International Law of the Articles of Agreement has been disputed. They were, in fact, an agreement between the British Cabinet on the one side, and the representatives of a *de facto* revolutionary Government on the other. The *de facto* revolutionary Government had never established its authority over the territory it claimed to rule, still less had its independence of the British Empire received formal recognition by any foreign Power. The case against the view that the Articles of Agreement were a treaty in International Law, and the case *for* the view that the use of the word 'treaty' was a mere concession to Irish sentiment, is therefore strong. On the other hand, President Cosgrave in his speech to the Assembly on the occasion of the admission of the

<sup>1</sup> Phelan, 'The Sovereignty of the Irish Free State,' *loc. cit.*, pp. 36-9.

Irish Free State to Membership of the League spoke of the Articles of Agreement as an 'international treaty,' and his description was not challenged.

One thing, however, is certain. Whatever the character of the Irish 'treaty' in International Law, it was not a normal example of an inter-Commonwealth agreement. In its origin, in its nature, and inasmuch as for its political execution it required legislation by the British Parliament, it differed essentially from an ordinary contractual agreement between Members of the Commonwealth—an agreement, for example, like the commercial 'treaty' which has recently been made by the Governments of Canada and Australia. It is possible, according to the point of view adopted, to hold that the 'Irish Treaty' was either less or more definitely international than an ordinary inter-Commonwealth agreement;<sup>1</sup> but even if the latter contention were admitted, it would only prove the more clearly that it was not a normal example of the kind of agreement now under consideration.

The second point is that if inter-Commonwealth agreements are presented to the Secretary-General of the League of Nations for registration and publication, they will certainly be registered and published. As said above, he has no possible right to refuse to register any agreement presented to him by any Member of the League. Moreover, if registration of inter-Commonwealth agreements should become the normal practice of Dominion Governments, there can be little doubt that it would furnish an effective settlement of the doubtful points concerning the interpretation of Article 18 which are discussed below. It was for this reason, no doubt, that the British Government entered its immediate and emphatic protest against the registration of the 'Irish Treaty'; they desired to ensure that

<sup>1</sup> Cf. arguments put forward by Phelan, *loc. cit.*

there should be no unchallenged precedent to which appeal could in future be made.

In point of fact, however, no more inter-Dominion agreements have been registered with the Secretary-General since the incident of the 'Irish Treaty' five years ago; and in view of the attitude then publicly adopted by the British Government regarding the general application of the Covenant to inter-Commonwealth relations, it is improbable that for some time at least any more such registrations will occur.

But if considerations of actual practice are left aside, is it possible on grounds of theory alone to give an answer to the question as to whether the terms of Article 18 apply to contractual agreements between Members of the Commonwealth?

At first sight it would appear that approximately the same arguments must apply to this point as were adduced in the consideration of the general problem of the application of the Covenant to inter-Imperial relationships of every kind, with the additional argument that there is nothing specific in Article 18 to show that it is not to be of general application among all the Members of the League.

But on a closer examination of Article 18 another and a wholly new point arises. It is this: Are not the words 'treaty' and 'international engagement' used in Article 18 technical terms of International Law which cannot in any case be properly applied to inter-Commonwealth agreements? This is no doubt the view upon which the British protest of 1924 was founded. That it is also the view taken by Sir Cecil Hurst is plainly shown by the interpretation of the word 'international' implied in the sentence which was quoted above.<sup>1</sup> This, if it is accepted, is obviously conclusive with regard to the phrase 'international engage-

<sup>1</sup> *Vide supra*, p. 292.

ments.' If their common allegiance to the Crown 'prevents the relations between the different communities of the Empire from being international relations,' it must follow that agreements made between them cannot be 'international,' and that therefore at least this second phrase used in Article 18, namely, 'international engagements,' does not include such agreements.

Does the same argument apply to the other word used in Article 18, namely, 'treaty'? Is there any rule in International Law which lays it down that a treaty is an agreement made between international persons which do not share a common allegiance to a common Crown?

The answer is not quite plain. It is true that many textbook writers define treaties as contracts between 'states.' Thus Oppenheim says: 'International treaties are conventions, or contracts, between two or more States concerning various matters of interest.'<sup>1</sup> This, however, is not really conclusive, for it is plain from the whole phraseology used by Oppenheim throughout his work that he used the word 'state' as equivalent to 'person of International Law.' If that phrase were now substituted in his definition for the word 'state,' it would give a definition of a treaty which would appear to cover inter-Commonwealth agreements, since there is no doubt that the Dominions are persons of International Law with the power to contract agreements binding in International Law. The same argument may be applied to most of what is said on the subject of treaties by such an authority as Hall.<sup>2</sup> Hall, however, gives a list of contracts made by states which are not to be counted as treaties in International Law, for the reason that the other party to them is not a subject

<sup>1</sup> I., § 491, 2nd ed.

<sup>2</sup> Vide *International Law*, 8th ed., p. 337 *et seqq.*

of International Law. 'Of this kind,' he says, 'are (1) "Concordats," because the Pope signs them not as a secular prince, but as head of the Catholic Church . . . ; (3) agreements with private individuals, *e.g.* for a loan; (4) arrangements between different branches of reigning houses . . . with reference to questions of succession and like matters.'

It might be possible to argue that there should be a new category added to Hall's list of contracts which are not treaties in International Law, namely, agreements made between Members of the Commonwealth *inter se*. This, however, is not very satisfactory. If when each of two persons of International Law makes agreements with foreign states these agreements are called treaties, why should the agreements which they make as between themselves not be given the same title and character? It is difficult to see a logical answer to this question. Keith has admitted that the arguments for the Irish point of view were serious,<sup>1</sup> and it must be added that, apart from the argument of the new constitutional convention discussed in the last two sections of this chapter, no further conclusive case has yet been put forward against the view that Article 18 should apply to inter-Commonwealth agreements.

In practice, the point in itself is plainly of no importance. Inter-Commonwealth agreements are and always will be regarded as binding in exactly the same way as international treaties. The problem now under consideration as to whether, in spite of the implications of

<sup>1</sup> Vide *Journal of Comparative Legislation*, February 1927, p. 89; also *ibid.*, 3rd Ser., vol. iii., part i., pp. 108-9, where various arguments are used; also *Responsible Government*, 1928 ed., ii. p. 911, where, in discussing the effect of the Report of 1926, Keith says: 'No argument appears to demonstrate convincingly the incorrectness as opposed to the

grave inconvenience of the views of the Free State.' Keith also attaches great importance to the precedent of Article 15 of the Barcelona Statute on Freedom of Transit (cited *supra*, p. 294). For his argument, which is that 'if the British principle were self-evident, it would not . . . be necessary to insert such clauses,' vide *op. cit.*, ii. p. 885.

the new constitutional convention, they are to be recognised as having an international character or not, will certainly be determined in accordance with the predominant desire of the Commonwealth Governments in years to come.

CAN THERE BE AN INTERNATIONAL DISPUTE TO WHICH ONE MEMBER OF THE BRITISH COMMONWEALTH IS A PARTY WITHOUT THE OTHER MEMBERS OF THE COMMONWEALTH BEING PARTIES ALSO?

This is again a problem to which reference has been made above,<sup>1</sup> and to which some of the arguments used with regard to the general application of the Covenant to inter-Commonwealth relations must obviously apply. It may be useful to reproduce once more the quotation from Mr. Rowell which was given above:

‘Canada owes allegiance to the same Sovereign as Great Britain, and so long as she continues to do so she would be a party in the interest and disentitled to a vote [under Section VI. of Article 15]. If she disclaimed her interest and claimed the right to vote she would thereby proclaim her independence.’ (*Morning Post*, February 4, 1920.)<sup>2</sup>

It must be noted that in the speech in which these sentences occur Mr. Rowell was discussing the possibility of a dispute between Great Britain and the United States, and the situation that would have arisen had the United States become a Member of the League of Nations and brought that dispute before the Council for consideration. His purpose in making his speech was to dissipate the impression prevalent in 1919 and 1920 in the United States that in such a case, Great Britain being the party to the dispute, Canada, as a separate Member of the League, would be able to use

<sup>1</sup> *Vide supra*, pp. 285-7.

<sup>2</sup> Cited by Duncan Hall, *British Commonwealth of Nations*, p. 348.

its separate vote in the Council, and thereby to paralyse the action of the Council if it seemed probable that the Council would decide the dispute against Great Britain. The point was only of academic interest at the time when Mr. Rowell made his speech, for the reason that no Dominion was then a Member of the Council; but it has become of more practical importance since Canada was elected a Member by the Eighth Assembly.

It may well be that in practice the separate votes of the Members of the Commonwealth would not be used in a dispute to which Great Britain was a party, on the very grounds which Mr. Rowell adduced.

This does not necessarily mean, however, that they could not legally be used, and it is the legal problem of their use that is now to be discussed. If there is an international dispute to which one Member of the Commonwealth is a party, are all the other Members automatically parties to that dispute, or are they not? In other words, are international disputes of every kind, whatever their nature and however exclusively they may concern the interests of a single Member of the Commonwealth, necessarily 'group questions' of the kind discussed above?

There is a preliminary point which must be dealt with first. Can a Dominion be a separate party to an international dispute? or must the party in every case in which any Member of the Commonwealth is involved be the British Empire as a whole?

The answer to this question would appear to be quite plainly that a Dominion can be a party to an international dispute. The arguments in favour of this view are as follow:

First, there is again nothing in the Covenant to indicate that in this respect the rights and position of a Dominion differ in any way from those of other Members.

There is nothing, that is to say, which any foreign Member of the League could raise as an objection if a Dominion claimed that it was in fact a party to a dispute.

Second, to deny that a Dominion can be a party to an international dispute would be absolutely inconsistent with the fundamental principles which underlie the whole international position which the Dominions have acquired as Members of the League.

Third, there is nothing in the nature of the British Commonwealth or in the nature of the constitutional relationship between its Members which supports the view that in any international dispute the 'person' involved must be the British Empire. Such an argument, indeed, borders on the absurd. Canada is free to make a treaty of its own with France which affects no other Member of the Commonwealth, and in which no other Member of the Commonwealth claims an interest greater than that of any foreign Power. If a dispute were to arise out of the meaning of such a treaty, and if that dispute were to be brought before the Council of the League, on what constitutional ground must the British Empire as a whole become the international 'person' which should deal with it? There is no constitutional ground of any kind.

Fourth, there have been in recent years a number of disputes both before the Council and the Permanent Court in which Great Britain has been a party individually and alone. In these cases her delegates have never claimed to speak for the Empire as a whole, including the Dominions, nor has any Dominion had an interest in what Great Britain has done. If there is equality of rights between Great Britain and the Dominions, it follows that the Dominions can also act as Great Britain has acted on these occasions.

For these reasons it is necessary to conclude that the Dominions can be parties to international dis-

putes.<sup>1</sup> Moreover, apart from theory, it is quite certain that if in practice a dispute arose which involved the interests of a Dominion, that Dominion would insist upon acting itself at least as the principal if not necessarily as the sole party thereto.

There follows the main question to be considered. If an international dispute arises to which one Member of the Commonwealth is a party, are all the other Members of the Commonwealth necessarily involved?

First, it is plain that if the other Members claim an interest and desire to be regarded as parties, they are entitled to be parties. This without question results from the constitutional convention which gives every Member of the Commonwealth the right to participate in negotiations begun by other Members.

But, second, are they necessarily obliged to be parties to the dispute? Have they the constitutional right to stand out? An argument used above may be once more applied. Suppose that one Member of the Commonwealth has made an international treaty in which no other Member has claimed any interest of any kind. If a dispute arises concerning the interpretation of that treaty, surely the non-signatory Members of the Commonwealth can be under no obligation to take part in that dispute? Again, it may be asked what there is in British constitutional arrangements that makes it impossible for them to disinterest themselves in the pacific determination, through the machinery of the League, of the meaning of that treaty? What is there in British constitutional arrangements which would make their action in refusing to be parties involve a breach of any kind of their allegiance to the Crown? How could there be such a breach of allegiance any more than when the treaty was originally made?

<sup>1</sup> Keith also arrives at this conclusion. Vide *Responsible Government*, 1928 ed., ii. p. 889.

✓ On these grounds, two conclusions seem clear in law. First, that there can be Dominion international disputes involving the exclusive 'national' interest of a single Dominion, and therefore only indirectly affecting the other Members of the Commonwealth; and second, that if such a dispute arises the other Members of the Commonwealth need not necessarily be regarded as parties to that dispute.

A political consideration may perhaps be added. The past history of Dominion policy makes it appear extremely improbable that the Members of the Commonwealth will in practice desire to be parties to all international disputes in which any one of them may be involved. For many years Dominion statesmen have consistently shown a strong disposition not to be mixed up in the diplomatic quarrels and complications in which the British Government might be involved. Moreover, on general grounds it is most improbable that South Africa, for example, will desire to be a party to a dispute concerning the meaning of Canadian treaties or *vice versa*. Consider an extreme case—that of the agreement made a few years ago between Canada and Japan on the subject of immigration. That agreement was negotiated by the Canadian Government separately and for itself, because it was impossible for the British Government, as a Government with great Asiatic interests, to take up the attitude with regard to the negotiation which Canada desired her to take.<sup>1</sup> If a dispute were to arise between Canada and Japan concerning the application of that agreement, would it be any easier for Great Britain to take the Canadian side than it was when the treaty was first

<sup>1</sup> Cf. Lewis: 'Thus the attitude of the Canadian Government in respect to Japanese immigration has been in such hopeless conflict with the policy of the British Government

that Canada has found it necessary to enter into a special agreement with Japan in the matter.' *B. Y. I. L.*, 1925, p. 43.

made? And even if Great Britain could do so, what could India do in such a case?

Of course, if a dispute were to reach a point where it was not only a question of pacific settlement through the machinery of the League or by arbitration, but where war was threatened or where action under the Covenant against an aggressor might be required, then the whole situation would be radically changed. Then, plainly, the threat of war would make it a 'group question,' that is to say, a question in which all the Members of the Commonwealth were necessarily involved. In that case the Governments of all the Members of the Commonwealth would necessarily be regarded as parties to the dispute. But since in the vast majority of all international disputes there is no threat of war, this consideration would only apply in exceptional cases. It may therefore be concluded that there can in law be international disputes to which a single individual Dominion is a party; and it may be added that in practice it is probable that such disputes will actually occur.

If this conclusion is accepted, certain other conclusions also follow.

Thus a Dominion which is a party to a dispute will automatically, in accordance with paragraph 5 of Article 4 of the Covenant, be represented in the Council of the League at which the dispute is dealt with. Moreover, even if other Members of the Commonwealth were to claim an interest and to act as parties, the Dominion principally concerned would without question conduct its own case before the Council.

Similarly, if a Dominion dispute were to come before the Permanent Court of International Justice the Dominion principally concerned would certainly demand

that it should have a national judge in accordance with the provisions of Article 31 of the Statute of the Court. The relevant paragraphs of Article 31 read as follows :

‘ Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.’

‘ If the Court includes upon the bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.’

‘ Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.’

As was argued in a previous chapter, there would appear to be nothing in these paragraphs or in the Covenant which would make the position of a Dominion in this respect any different from that of any other Member of the League which is a signatory of the Statute of the Court.<sup>1</sup>

#### THE PROBLEM OF ‘AUTOMATIC BELLIGERENCY’ AND THE EFFECT OF THE COVENANT OF THE LEAGUE OF NATIONS.

There remains the important problem of what is sometimes called ‘automatic belligerency.’

It is generally agreed by all constitutional authorities, as has been said above,<sup>2</sup> that if one Member of the Commonwealth is at war, all the other Members are likewise at war. This is held to be a necessary consequence of their common allegiance, both in British constitutional law and in International Law.

Thus Pearce Higgins wrote in 1925 : ‘ Should war be declared against Great Britain by another state, it

<sup>1</sup> Cf. *supra*, pp. 102, 104, and 129.

<sup>2</sup> *Vide supra*, pp. 229-30.

still appears to be the case that all the Dominions of the British Crown would be involved.' <sup>1</sup>

Duncan Hall has written: 'The legal position that when the King declares war all his subjects are at war, which was fully accepted in all the discussions on the Lausanne and Locarno Treaties, has not been altered by the Balfour Report' <sup>2</sup> (i.e. the Report of 1926).

Mr. L. S. Amery, Secretary of State for the Dominions, has said: 'In war . . . no subject of the King can be a friend of the King's enemies, or, in other words, neutral in the strict sense of the word.' <sup>3</sup>

Smith and Corbett have written: 'There is absolutely no basis, either constitutionally or internationally, for the contention that Canada can be at war while Great Britain is at peace.' <sup>4</sup>

The argument in favour of this agreed view has been well stated by McNair, who writes:

'On the question of what is sometimes called "automatic belligerency," the editor's opinion is that unless and until there is some definite constitutional act dissolving the Empire, whether as a consequence the constituent parts come to form a true Personal Union under the Crown, . . . or become entirely separate states, it is legally impossible for Great Britain to be at war without the whole of the Empire, self-governing or not, being at war too, and equally impossible for any Dominion to be at war without Great Britain being at war. It is only the King that can legally make a declaration of war, and the King, unless and until the British Empire becomes a Personal Union of States acknowledging him as their sovereign, cannot be partly at war and partly at peace.

<sup>1</sup> Hall's *International Law*, 8th ed., p. 35.

<sup>2</sup> The *British Commonwealth of Nations*, Lowell and Hall, World Peace Foundation Pamphlets, 1927, vol. x., No. 6, p. 618.

<sup>3</sup> *Journal of the R.I.I.A.*, January 1927, p. 17. Cf. a similar speech made by the Australian Prime Minister in 1927, cited by Hall, Lowell and Hall, p. 684.

<sup>4</sup> *Canada and World Politics*, p. 95.

. . . And a declaration of war could only be legally addressed to the Crown as representing the whole Empire. So it is impossible for any Dominion or any other part of the Empire to remain *legally* neutral when the Empire is at war. . . .<sup>1</sup>

This theoretical argument, is, of course, entirely supported by actual practice. The invariable practice up to the present time has been that when war has been declared by a British Government it has been done by the King in respect of the Empire as a whole. As Mr. Amery suggests, the legal duties of loyalty in time of war have universally been held to be the inevitable consequence of allegiance to the Crown. Moreover, up to the present time no one has suggested that any change should or could be made in this practice, or in these universal duties of loyalty in time of war. 'Nothing has been done,' says Keith, writing in 1927, 'in the way of asking foreign nations to concede to the Dominions the right of remaining neutral in British wars.'<sup>2</sup> Nor, it may be added, has the point even been discussed, so far as is known, in any of the constitutional debates of the Imperial Conference. Until such a change were formally proposed, adopted by the Governments of the Commonwealth, put forward for the acceptance of foreign Powers, and recognised by them, it would be impossible to say that so vital an alteration in the status of the Dominions in International Law had taken place.

There is, moreover, further supporting evidence for the view that no Government in the Commonwealth even desires to make a change. Article 49 of the Constitution of the Irish Free State provides thus: 'Save in case of actual invasion, the Irish Free State shall not be committed to *active participation* in any war without

<sup>1</sup> Oppenheim, *International Law*, 4th ed., i. p. 199, note 2.

<sup>2</sup> *Journal of Comparative Legislation*, February 1927, p. 86.

the assent of the Oireachtas'<sup>1</sup> (*i.e.* the Parliament of the Irish Free State). These words alone would be conclusive, for they plainly assume the *legal* belligerency, whenever he might be at war, of every part of the territories over which the King rules.

But these words from the Irish Constitution also make plain another important fact, which is that legal belligerency does not necessarily involve 'active participation' in the operations of the war. It has, indeed, always been recognised that no Dominion was under any constitutional obligation to participate actively in a war which the British Government might declare. The share which a Dominion may take in the operations of such a war is freely decided in its own discretion by the Parliament of that Dominion. If a Dominion Parliament were to decide to take no active part whatever, then its belligerency would be what has sometimes been called 'passive.'

Such 'passive belligerency' would be in no way the equivalent of neutrality. If, for example, Canada took no active part in a war in which Great Britain was engaged, it could not be treated for any legal purpose as neutral. Canadian ships would be liable to lawful capture on the high seas by the enemies of Great Britain. Canadian territory would be liable to invasion. Canadian ships carrying articles of contraband to enemies of Great Britain would be liable to forfeiture in a British Prize Court on the ground of trading with the enemy.

All this is clear, and indeed quite undisputed. Moreover, the language used by some writers—for example, by McNair in the passage cited above—leads to the conclusion that it is an inherent and inevitable and eternal result of the common, allegiance to the King that no Member of the Commonwealth can be at war without involving all the rest. 'Allegiance to the same

<sup>1</sup> The italics are mine.

sovereign,' another author has said, 'necessarily involves this [*i.e.* common belligerency] . . . a declaration of neutrality would imply 'a secession.'<sup>1</sup> If the law remained what it is at present, this of course would be true. But it is perhaps interesting to ask the question whether it is theoretically impossible that the King should be 'partly at war and partly at peace'; that he should be at war on behalf of one of the Members of the Commonwealth and not of the rest? Is it inconceivable that British public law within the Commonwealth should be so changed by statute that the legal duties of allegiance in time of war should not apply equally to all the King's subjects? And if, having so changed the statute law, the Members of the Commonwealth demanded recognition for the right of each of them to remain neutral when the rest were at war, and if foreign Powers granted that recognition, would not their right become effective in International Law? Such action would of course make a fundamental difference in the nature of the relationship of the Members of the Commonwealth. But would it necessarily reduce that relationship, as McNair says, to nothing more than a Personal Union? Would it necessarily sever the other constitutional links that now bind the Members of the Commonwealth together? If it is legally and constitutionally possible for the King to make a treaty with a foreign Power on behalf of one Member of the Commonwealth alone, why should he not also be able to make war on behalf of one Member alone? Has not something similar been known in International Law in the past when part of the territory of a state has been 'neutralised' by treaty, and has remained neutral when the state of which it was otherwise an integral part has been at war?<sup>2</sup> This neutrality of the Members

<sup>1</sup> Lewis, *B.Y.I.L.*, 1922-3, p. 33.

<sup>2</sup> *E.g.* part of French Savoy under the Treaty of Vienna, 1815.

of the Commonwealth would, of course, be of a special and perhaps anomalous kind, for it would allow the Members of the Commonwealth to elect not to be neutral if they so desired; but because it would be novel, is it therefore impossible?

To these questions the present writer offers no answer. And, indeed, in the light of the Covenant of the League of Nations and of the Kellogg Pact (*vide* below), it may be hoped that they are destined to remain, as they now are, wholly academic. The essential fact of the present situation is that no such change has been made or contemplated. The fact of common allegiance does, therefore, as the law still stands, involve common belligerency for all the Members of the Commonwealth in any war in which any one of them may chance to be engaged.

Does this mean that the recent changes effected in the constitutional status of the Dominions by the Report of 1926 and the events by which it was preceded have had no effect whatever on their position with regard to the declaration of war? Have they no more right in that respect than they had in 1914, when the British Government declared war without even formal 'consultation'?

Keith appears more or less to take that view. 'The Dominions,' he asserted, writing in 1927, 'still recognise that they are liable at any time to be involved in war by British action, and no compact has ever been made that no British declaration of war or peace shall be issued without Dominion assent. The British Government, it is clear, could not consent thus to limit its freedom of action, but, so long as this is the case, it is misleading to talk of equality.'<sup>1</sup>

Other writers disagree. Dupcan Hall quotes with approval from the *Round Table* a sentence which indicates that a vital change has been introduced:

<sup>1</sup> *Journal of Comparative Legislation*, February 1927, p. 86.

'The initiative leading to war is entrusted to each and every self-governing partner in the Commonwealth as an essential function of equality of status in domestic and external affairs.'<sup>1</sup> If equality of status, on which the Report of 1926 lays such repeated stress, really means anything at all, it would seem that Hall and the *Round Table* are right. But Hall adds, and again he is plainly right, that another change no less important has also been made, namely, that no Member of the Commonwealth can exercise this right of the 'initiative leading to war' without prior consultation with all the other Members. He does not make clear whether he would press the application of this constitutional convention in respect of the declaration of war to the point of saying that no such declaration could constitutionally be made unless all the Members of the Commonwealth had previously and unanimously agreed. And since the Report of 1926 is wholly silent on the point, it is not possible to say whether or not what Keith calls a 'compact' on this point has been made. The Irish Minister for External Affairs has made the following interesting declaration: 'So far as I can interpret it, it would mean on strictly theoretical constitutional lines that the King could only declare war when he had simultaneous unanimous advice to that effect from all the Governments. That would be the constitutional position.'<sup>2</sup> This declaration supports Hall's conclusion, but of course no single declaration can be decisive. It is unlikely that any Government would dispute the Irish Minister's statement, but nevertheless it is necessary still to say that the point is one of the unanswered problems of inter-Commonwealth relations which only time can solve.

<sup>1</sup> Lowell and Hall, 1927, p. 618. Cf. *Round Table*, March 1927, p. 227.

<sup>2</sup> *Ibid.*, p. 691. McNaïr also supports this view: *vide op. cit.*, i. p. 199, note 2.

If the question is considered as a matter of political surmise, it may well be that Keith is right, and that the British Government would insist on the right to declare war if it desired to do so, even if some of the Dominions refused their assent. The Irish Minister himself, later in the speech which has just been quoted, appeared to regard this as possible, and he did not conceal his opinion that if this were to happen a most difficult and dangerous situation might arise.

But happily the Covenant of the League of Nations renders far less probable any practical danger of this kind. It furnishes, as Lord Grey has said, a common principle of foreign policy with regard to the making of war on which all the Members of the Commonwealth will in future desire to stand. It is plain, therefore, that the whole problem of Dominion belligerency must now be considered on the basis of the Covenant and of the obligations with regard to the making of war which under the Covenant the Dominions have accepted in their own separate name and right.

There are three possible cases in which a declaration of war by the Crown might be made, in respect of each of which the effect of the Covenant must be considered.

The first is the case of warlike action taken in support of the Covenant in pursuance of the obligations of Article 16 against a Covenant-breaking Member of the League. In such a case all the Members of the Commonwealth would plainly be equally bound by their own individual obligations to take whatever coercive action against the aggressor might be required under the terms of Article 16, and no problem of inter-Imperial relationship therefore arises.<sup>1</sup>

The second case is when, Article 15 of the Covenant having broken down, the Members of the League regain

<sup>1</sup> Cf. South African Note to the United States Government regarding the Kellogg Treaty of 1928, *vide* pp. 116-17, *supra*.

'the right to take such action as they shall consider necessary for the maintenance of right and justice.'<sup>1</sup> If in such a case Great Britain as a party to a dispute declared war against the other party, then again the situation of the Dominions would be quite clear. The existing rules of International Law would apply, and they could only remain neutral if two conditions were fulfilled: first, if they declared their independence—that is to say, if they seceded from the British Empire; second, if Great Britain's enemies agreed to recognise their independence and to regard them as neutral. Short of this, they would necessarily be involved as belligerents by the action of Great Britain.

The third case is more difficult. It would arise if Great Britain were to violate its undertakings under the Covenant and to make war as an aggressor in breach of the Covenant. If this were to happen, the position of the Dominions would plainly be most difficult. They would have in law two indisputable duties which would be in conflict with each other. Under the existing rules of British constitutional law they would clearly be the enemies of the enemies of the King. Under the Covenant they would equally clearly be obliged, by the separate obligations and duties with regard to the foreign Members of the League which they have individually accepted, to assist in coercing Great Britain. They would owe this duty to the foreign Members of the League as a complement to the right, which in common with all other Members of the League they have, to claim help from these foreign Members if they themselves are aggressively attacked. This duty, moreover, would in no way be affected even if it were universally agreed that the Covenant does not apply

<sup>1</sup> Article 15, para. 7. It should be noted that when the Kellogg Pact of 1928 becomes of universal binding

force this case will no longer be legally possible.

to the relations of the Members of the Commonwealth *inter se*.<sup>1</sup>

This may appear to be an extreme statement and one which to many people is little short of fantastic. Nevertheless, no valid argument has up to the present time been brought against it. The following argument was put forward by Mr. Rowell in the debates on the Treaty of Versailles in the Canadian Parliament in 1919:

(1) 'That the Council would recommend the Dominions to take such action against Great Britain was an "unthinkable proposition."'

(2) 'If, however, the Council did give this advice, say to Canada, she would at once become entitled under Article 4 "to sit as a Member" on the Council; and since the Council cannot act except by the unanimous consent of its Members, Canada could not be compelled to take any such action unless she agreed to it.'<sup>2</sup>

Unfortunately, this argument is quite unconvincing; and indeed if any Dominion were so to act knowing that Great Britain had in fact made itself an aggressor, it would plainly be disloyal to its international obligations.

Thus it seems clear that if Great Britain were, in breach of the Covenant, to make aggressive war, the Dominions would find themselves bound by two conflicting duties, between which they would be obliged to choose. Fortunately, the situation conceived is one which no Englishman is willing to agree is likely to arise. Indeed, it remains true that the Covenant, so far from creating new problems in this or in other ways

<sup>1</sup> Discussing the possibility of this case under the unratified Geneva Protocol, Keith says that it is 'necessary to eliminate the possibility of coercion of one part of the Empire by the other British Members of the League. Such a situation,' he adds, 'may be extremely unlikely to arise;

it is not possible to assert that it is inconceivable under the terms even of the Covenant.' *J.C.L.*, May 1925, p. 108. Cf. also Smith and Corbett, *op. cit.*, pp. 113 *et seq.*, for a different argument.

<sup>2</sup> Duncan, Hall, *British Commonwealth of Nations*, p. 344.

for the British Commonwealth, is on the contrary likely to provide a solution for many of the most difficult problems that are likely to arise. This is true above all with regard to the problems that might arise as the result of declarations of war.

Professor Zimmern has described the League of Nations as a *deus ex machina* for the British Commonwealth. His phrase is in no way an exaggeration, and the effectiveness of the League in solving the most difficult problems of inter-Commonwealth relations is only likely to be increased by the Kellogg Pact for the Renunciation of War made at Paris in 1928. For the chief danger to the unity of the Commonwealth seems to lie in the possibility of a sudden international crisis, where the British Government might be compelled to take decisions with a rapidity that would make effective 'consultation' with the Dominion Governments extremely difficult. But this danger is evidently reduced by the existence of the new rules and institutions of the League and of the Kellogg Pact. As Sir Robert Borden has said, in discussing the difficulty of inter-Commonwealth 'consultation' at a time of crisis :

'Having regard to the new spirit of international consultation and co-operation which had been established in the League of Nations, he thought it extremely probable that if any future crisis should arise the League could ensure such consultation as, if it had been possible in 1914, would have prevented the world war.'<sup>1</sup>

A further quotation on the same point may perhaps also be made from a speech by the Prime Minister of Australia :

'Hitherto,' said Mr. Bruce in 1927, 'there has always been the fear that we in Australia may be dragged into some of the difficulties and troubles of Europe. In the

<sup>1</sup> *J.R.I.I.A.*, July 1927, p. 211.

past the foreign relations of the Empire presented a very difficult problem. But in the provision for the settlement of international disputes we see the greatest achievement of the League of Nations. There is now a basis for a policy which should be acceptable to the Dominions.' <sup>1</sup>

The above discussion is far from covering all the obscure or difficult questions which may arise in years to come in connection with the international position which the Dominions have acquired. 'It is manifest,' says Sir Robert Borden, 'that the Commonwealth has not by any means solved all its problems. Any one would be utterly rash who would venture to predict the method by which the voice and influence of the Dominions will at all times receive such adequate consideration that the unity of the Commonwealth in external relations will not be impaired.' <sup>2</sup>

What developments of 'method' the future will produce no one can foresee. A distinguished constitutional historian has suggested that it is 'merely a question of time before every function of the Crown is put into a separate Commission for each Dominion of the Empire.' <sup>3</sup> Without accepting this conclusion, it is necessary to admit that the course of events in recent times, and even of events since the adoption of the Balfour Report of 1926, indicates that further developments in the international rights and duties of the Dominions are certain to occur. These developments will not occur as the result of sudden or revolutionary changes, but step by step, as practice gradually evolved,

<sup>1</sup> Speech in the Australian House of Representatives, March 3, 1927, cited by Hall, Hall and Lowell, 1927, p. 685.

<sup>2</sup> *Loc. cit.*, p. 207.

<sup>3</sup> Professor A. F. Pollard in 'The Dominions and Foreign Affairs,' *Proceedings of the B.I.T.A.*, May 24, 1921, p. 5.

and the questions which they will bring up for solution cannot be foreseen. As Keith has said of the application of the Covenant to inter-Commonwealth relations, 'the truth is . . . that the matter could not be thought out in advance,' and in consequence it 'presents a problem which time and usage alone can solve.'<sup>1</sup>

## NOTE

### THE CASE OF THE 'I'M ALONE'

In March 1929 a Canadian schooner, the *I'm Alone*, engaged in smuggling liquor into the United States, was chased and sunk on the high seas by a cutter belonging to the United States coastguard service, and the captain and crew were taken as prisoners to United States territory. The *I'm Alone* was registered as a Canadian vessel and commanded by a Canadian 'national,' Captain Randell of Nova Scotia. As the action of the United States cutter appeared to be a violation of International Law, a protest was made by the Canadian Government and negotiations for compensation were begun. The case excited great interest in Great Britain, and involved questions of International Law—limits of territorial waters, right of 'hot pursuit,' etc.—in which the British Government had an obvious interest. Nevertheless, action was taken, and negotiations conducted, by the Canadian Government alone. They acted through their own Minister in Washington, who, it was reported in the Press, 'consulted' the British Ambassador throughout. This is evidently a notable precedent of diplomatic action through a Dominion Legation in a Dominion international dispute of first-rate political importance, in which Dominion 'national' interests were involved.

<sup>1</sup> *Responsible Government*, 1928 ed., ii. p. 886.

## CHAPTER VIII

### CONCLUSIONS

#### THE LEGAL PERSONALITY OF THE DOMINIONS AND OF THE BRITISH EMPIRE

THE purpose of this chapter is to discuss, in the light of the facts above set forth, three questions of fundamental importance, and to suggest certain conclusions with regard to them. The three questions are these:—

1. Have the Dominions now become separate persons of International Law, or have they not?

2. If they have, does their personality differ from that of those other persons of International Law which are usually described as 'independent Sovereign States'?

3. If the Dominions have become separate persons of International Law, has the British Empire as a whole ceased to be such a person?

And if not, what kind of a person must it be said to be?

#### HAVE THE DOMINIONS NOW BECOME PERSONS OF INTER- NATIONAL LAW, OR HAVE THEY NOT?

In the year 1926, before the meeting of the Imperial Conference which drafted the Balfour Report, a very eminent authority, Sir W. Harrison Moore, wrote a remarkable paper in which he discussed these questions.<sup>1</sup> In the introductory paragraphs of that paper he asked the question whether the then practice of the British Governments could be 'worked out consistently

<sup>1</sup> Vide *Journal of Comparative Legislation and International Law*, Feb. 1926, pp. 21 *et seqq.*

with any legal unity of the British Commonwealth of Nations in international relations; whether from a system in which the British Empire was a single entity in international relations, but for most practical purposes a number of separate entities in constitutional relations, we are not proceeding to one in which such unity as remains is to be found in the constitutional sphere, while international relations are given over to severalsness.<sup>1</sup>

Later in his paper Sir W. Harrison Moore answers this question in the following way :

‘Some light may perhaps be obtained from a comparison of the pre-war position of the colonies and Dominions with that of the Dominions to-day. In the writer’s opinion, the general disposition to deny international personality to the British colonies and Dominions was not unconnected with the very common tendency of publicists and jurists to concentrate attention on States as “Powers,” and to neglect the co-operative relations of political communities, and the extensive organisation of the Society of Nations for co-operative purposes. It appears hard to deny the personality of colonies or Dominions when His Majesty acceded to or denounced on their behalf conventions with foreign Governments, and when Australia or Canada became actual Members of international organisations [Sir W. Harrison Moore means the pre-war international administrative Unions], acting separately from the British Government, undertaking obligations and incurring liabilities. . . . We may say that [in the pre-war period] recognition of the Dominions in foreign relations was for particular purposes and interests, and was not a general and unqualified recognition for all purposes of state life; that these particular purposes and interests were economic and social rather than political, that they belonged to the amenities rather than to the fundamental relations of

<sup>1</sup> *Loc. cit.*, p. 24.

international society ; that in the main they were of the class of matters commonly recognised as within the internal and domestic jurisdiction of the State except so far as agreement brought them within the range of International Law. In particular, they did not embrace matters which involved the whole political existence of the community in its relation to other communities. The Dominions were international persons in that they were entities in relation with other States, and were so recognised both by Great Britain and foreign States. They were abnormal persons in that the range of their relations with other States was particular and restricted, and not general and unlimited. If any matter arising out of these particular relations became one of contest or dispute with a foreign State, it passed into the sphere of high politics and became one between the foreign Government and the British Government, in a real and not merely a formal sense ; the limits of the particular personality of the Dominion were passed, and it merged in the undivided unity of the British States. . . . [Here Sir W. Harrison Moore passes on to discuss the post-war situation of the Dominions.] If the treaty be between a Dominion and a foreign Power which is a Member of the League of Nations, there are some other factors to be taken into account. The Dominions have been admitted formally as Members of an organised Society of States which aims at including all States accepting its objects and obligations ; the scope of the League of Nations extends to every possible subject of international relation or dispute, so that it is concerned with the first and last things of state life. Members of a society which deals with the issues of peace and war, the Dominions have entered upon relations which differ not merely in degree but in kind from those which arise from the Membership of international administrative unions.'<sup>1</sup>

The present writer, as he has already indicated in previous chapters, finds himself in complete agreement

<sup>1</sup> *Loc. cit.*, pp. 34-6.

with this statement. And he understands it to mean that the Dominions are now, for all the most important purposes of the life of the Society of States, separate persons of International Law. This conclusion, indeed, seems to him obvious and beyond dispute. Canada can conclude treaties with foreign States, the effect of which is limited to Canada alone; she can establish diplomatic relations, pursue her own policy as a separate Member of the League of Nations, exercise all the other rights and fulfil all the other duties of International Law described above: how, then, can it be doubted that Canada is a person of International Law?

There is, however, one complicating doubt that must be resolved. It may be argued that neither a Dominion nor Great Britain itself can be a 'person of International Law,' for in respect of both of them it is the King who is the legal person, it is the King as Head of the State who contracts with foreign Powers, who despatches and receives diplomatic missions, who exercises the undiminished functions of the royal prerogative in respect of all relations with foreign States. Since this is true, it may be argued, it cannot be theoretically nor even practically accurate to say that the Dominions are separate persons of International Law, for there is and can be only one such person in the British Empire, the King himself. He may exercise his sovereign will through different Governments in different Dominions of his single realm; he may send to international conferences different representatives to speak for him on behalf of these different Governments; these representatives may speak with different voices, and may pursue each a separate policy of his own, according to instructions which his Government gives him. It will none the less remain true that the King is the only person of International Law, though he is a person of complex character, a person (if it be desired so to

express it) with a single head but with six separate bodies. And in this situation, the argument will be concluded, no change is possible so long as there is no change in the nature of the Kingship, so long as the doctrine of 'the unity and indivisibility of the Crown'<sup>1</sup> remains supreme in constitutional law.

There is much in this theory that at first sight is attractive. But the present writer believes that in reality it rests upon a fiction, and that it is impossible to reconcile it with the facts of practice. For, if it be accepted, what is the explanation of the fact that some treaties with foreign Powers are made not in the name of the King but in the name of the Dominions, and that these treaties are universally recognised as valid contracts in International Law? What is the explanation of the fact that the Dominion delegates to the Assembly of the League of Nations bring with them credentials signed not by the King but by their own Government authorities at home, and that these credentials are accepted as sufficient for the vitally important purposes of the League? What is the explanation of the fact that Great Britain and Canada both send delegates to sit as members of the Council of the League, delegates who, although no doubt they are often in 'consultation,' nevertheless act in all respects and on all occasions under wholly separate authority and wholly independently of each other?

The truth is that the use of the words 'person' and 'King' is liable to lead to confusion of thought. It sounds straightforward to say that the King, as Head of the British Empire, is a person of International Law. But it leads to confusion if it makes us think that the King *as an individual* is a person of International Law, for he is not. A 'person' of International Law is not an individual, or a corporation; a legal person, as

<sup>1</sup> Cf. *supra*, pp. 213 *et seqq.*

defined in Pollock's phrase cited above, 'is such because rights and duties are ascribed to him. *The person is the legal subject or substance of which rights and duties are attributes.*'<sup>1</sup> Personality, that is to say, is the legal capacity for rights and duties. In this sense, how is it possible to deny that Canada has separate personality in International Law? And when we say 'Canada,' what do we mean? We mean the separate autonomous community of Canada, whose separate autonomous Government is its active agent in its relations with foreign States. Of that Government, the King, in virtue of his office, is the Head; that is to say, he is a part, and an essential part, of that Government. But that is *not* to say that he is the Government of Canada; he certainly is not the Government of Canada, whether it be for the purposes of International Law or for any other purpose of any kind. He is not capable of relations with a foreign Power in respect of Canada without the co-operation of his Canadian Ministers, any more than his Canadian Ministers are capable of such relations without authority from him. Together they are capable of such relations; and they are capable of them without any help, co-operation, or authority from his Ministers in any other part of the British Empire.

The point is, perhaps, well illustrated by the terminology of the 'C' Mandates conferred upon some of the Dominions. Commenting on this terminology in the New Zealand Mandate for Samoa, Sir W. Harrison Moore has written as follows:

'The terms of the "C" Mandates are in fact chaotic. First, the instrument recites that the mandate is conferred on His Britannic Majesty, to be exercised on his behalf by the Government of New Zealand in the case of Samoa; then, in the next paragraph it is declared that His Britannic Majesty, for and on behalf of the Government

<sup>1</sup> *Vide* pp. 121-2, *supra*. (My italics.)

of New Zealand, has agreed to accept the mandate ; so that each of the parties designated is in relation to the other principal and agent. The article defining the territory speaks of the mandate as being conferred upon His Britannic Majesty for and on behalf of the Government of New Zealand, and it is that Government which is called the Mandatory.' <sup>1</sup>

The language undoubtedly is confused, and perhaps results from a genuine confusion of thought on the part of its authors ; but does it not in reality state the substantial truth of the matter, which is that the international person on whom the mandate was being conferred was New Zealand, of whose Government His Britannic Majesty was an essential part ? It is plainly in his capacity as part of that Government that the King is mentioned. The simplest and the most straightforward way of expressing this undoubted fact is to reject the difficult and unconvincing metaphysical conception of a single person with a multiplicity of similar members, and to say boldly that 'Canada,' 'New Zealand,' and the rest are separate persons of International Law.

So far the matter appears to the present writer to present no difficulty. There is, however, one other point that requires elucidation. The King is a part of the autonomous Government of Canada, and is indeed its Head. But in what capacity is he its Head ? He is the King *in* Canada ; but is he the King *of* Canada ? Has he, that is to say, a separate capacity as Head of the Canadian Government ? When he makes a treaty on behalf of Great Britain and the five Dominions, he makes six separate contracts with foreign States ; <sup>2</sup> but does he do so in a separate capacity for each Dominion ?

<sup>1</sup> For the terms of the Preamble of the New Zealand Mandate, on which Sir W. Harrison Moore is

here commenting, *vide* p. 106, *supra*.

<sup>2</sup> *Vide* p. 190, *supra*.

The answer would appear to be in the negative. No one has ever disputed the principle in British constitutional law of the 'unity and indivisibility of the Crown.'<sup>1</sup> The King is not King of Great Britain, King of Canada, etc.; on the contrary, he is precisely what his title, defined in a British statute of 1927, declares him to be: 'George V. . . . of Great Britain, Ireland, and the British Dominions beyond the seas, King. . . .' He has not six crowns, he has only one; it is in virtue of one crown, one office, one succession, that he is King in Canada as well as in Great Britain. It would appear to follow that it is in this one and unified capacity that he acts when he co-operates with his Canadian Ministers in making a treaty on behalf of Canada.

I have said that 'it would appear to follow' that this is so. But the answer is not absolutely certain. The problem has arisen very often in British courts in questions falling within the domain of British constitutional law. Of such cases Sir W. Harrison Moore has written:

*'Personality of Autonomous Communities.*—The choice of apt words for adapting the unity of the Crown to the existence of distinct autonomous communities of which the King is the constitutional head and bears the juristic *persona*, is a difficulty which belongs to our undetermined attitude as to the personality of these communities. In constitutional law, our lawyers seem uncertain whether they should speak of the Crown representing the community, or of the community representing the Crown (as where it is claimed that a State or the Commonwealth in a federal system is entitled to prerogatives of the Crown); *whether there is one juristic personality or several, how far the Crown in one "right" can legally be separated from the Crown in another "right" either for purposes of jurisdiction or for purposes of substantive right*; Australian and Canadian reports are full of instances.' And he adds:

<sup>1</sup> Vide p. 213, *supra*.

‘In international relations, the same difficulty appears, and for the same reasons.’<sup>1</sup>

In view of these doubts in the minds of the British constitutional lawyers, it may be possible to hold that the King, when he co-operates with his Canadian Ministers in making a treaty in respect of Canada, does so, not perhaps in a *separate*, but at least in a *special* or *several* capacity. At least one Dominion statesman has actually used this very phrase. ‘Nothing on the face of any international instrument,’ said Mr. Fitzgerald in discussing the Balfour Report in December 1926, ‘will leave room for any other interpretation of their [*i.e.* the Members of the British Commonwealth] special relationship than that they are *under the same King acting in a several capacity*.’<sup>2</sup>

Sir W. Harrison Moore himself, in discussing the point now under debate, appears to reject the possibility of legally separating the Crown in one ‘right’ from the Crown in another ‘right,’ for he comes to the following conclusion :

‘While the King agrees to a treaty in respect of Canada . . . he appears to act not in any limited capacity as King of Canada, but in a capacity according with his title.’<sup>3</sup>

And he says that his full title is used

‘not merely for the identification of a person, but as signifying that Canada, though having rights and duties of her own, holds these within the wider political community, *i.e.* the British Empire, to which she belongs, and therefore holds them separately only so far as is consistent with membership of that State.’<sup>4</sup>

What does this conclusion mean in practice? To demonstrate his view of its results, Sir W. Harrison

<sup>1</sup> *Loc. cit.*, pp. 29-30. (My italics.) 1927, p. 689. (My italics.)

<sup>2</sup> Speech in Dail Eireann, Dec. 16, 1926, cited by Lowell and Hall,

<sup>3</sup> *Loc. cit.*, p. 33.

<sup>4</sup> *Ibid.*

Moore takes again this example of a treaty made by the King in respect of Canada alone, and points out that if the treaty requires legislation, that legislation can only be effected by the Canadian Parliament; if the treaty confers privileges on the citizens of the contracting parties, only Canadian 'nationals,' and not all British subjects, will enjoy those privileges. So far all is clear.

He goes on to say that the fact of the King acting in a general capacity

'does not mean that the nature and extent of the obligations of the treaty are to be measured and limited by the powers which the constitutional law of the Empire confers upon the Government (including the Legislature) of Canada. It is rather that the King in his fullest capacity (i.e. the British Empire) is bound to the complete fulfilment of the treaty, irrespective of any constitutional limitations on Canada, just as he would be bound internationally by any treaty which, as a matter of constitutional law, required some alteration of the law in order that its terms should be carried out. In this sense every treaty appears to do something more than impose obligations upon one part of the Empire alone.'

This conclusion is in some respects a little hard to reconcile with the plain language of the Treaty Resolution of 1923.<sup>1</sup> But even if it be accepted, does it in any way invalidate the contention that the Dominions are persons of International Law? Not in Sir W. Harrison Moore's opinion, as is shown by his final opinion quoted on page 345 above. Moreover, lest that opinion should still leave any doubts in the mind of the reader, Sir W. Harrison Moore has another passage in which he points out that when the Smuggling Treaty was made by the King 'in respect of' Canada, Canada

<sup>1</sup> § I.2(a) reads: '*Bilateral Treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part.*' Cf. p. 172, *supra*.

was conceived of as 'more than the identification of an area of operation'; it was conceived of 'as a political community with an organised Government, and (in the light of the resolutions of the Imperial Conference of 1923) there is the implication that that political community is an entity, a whole, capable of holding rights and owing duties towards a foreign Power.'<sup>1</sup> In other words, Canada was 'conceived of' as a person of International Law.

The grounds for this conclusion were greatly strengthened by the Balfour Report of 1926, drawn up nearly a year after the writing of this paper by Sir W. Harrison Moore, which has been quoted at such length. They are further strengthened by the authority of Sir Cecil Hurst, who, writing in 1927, spoke without hesitation of 'the distinct international personality of the Dominions.'<sup>2</sup>

With this eminent support, therefore, we need be dismayed neither by the metaphysical conception of a single international person operating through six different sets of members, nor by the difficulty of the 'capacity' of the King when he makes an international contract 'in respect of a Dominion.' Setting such theoretical obscurities on one side, we may boldly claim that the essential legal fact of the situation is that within the scope of the wide international rights and duties which they are now entitled to exercise the Dominions have become separate persons of International Law.'<sup>3</sup>

<sup>1</sup> *Loc. cit.*, pp. 30-1.

<sup>2</sup> *Op. cit.*, p. 92.

<sup>3</sup> Cf. McNair, Oppenheim's *International Law*, 5th ed., 1928, p. 198: 'There can be no question that Australia, Canada, the Irish Free State, Newfoundland, New Zealand, and South Africa have acquired a position in International Law and in the Society of States.'

Cf. also Smith and Corbett, *op. cit.*, p. 56: 'In so far as the constitution allows Canada to assume separate obligations [it should be noted that Smith and Corbett do *not* consider her power of treaty-making to be complete], and foreign States enter into agreements with her imposing such obligations, she is acting as a distinct entity, a person of International Law.'

DOES THE PERSONALITY OF THE DOMINIONS IN INTERNATIONAL LAW DIFFER FROM THAT OF THOSE OTHER PERSONS OF INTERNATIONAL LAW WHICH ARE USUALLY DESCRIBED AS 'INDEPENDENT SOVEREIGN STATES' ?

The Dominions are persons of International Law. What kind of persons are they ? Having the rights and duties which have been described, are they full international persons, similar in all respects to 'independent sovereign States,' or are they something less, units *sui generis* in the Society of States ?

It is possible to make a *prima facie* case for the view that the Dominions differ very little, if at all, from independent sovereign States. A generation ago a great British authority on International Law gave the following definition of a sovereign State : 'The marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.'<sup>1</sup> This definition was adopted with approval by the greatest of all British authorities, Westlake.<sup>2</sup> Is there any respect in which it could not be applied to-day to the Dominions ? The Dominions are permanently established for a political end, they have defined territories, and there are probably few Dominion statesmen alive to-day who would admit that they are subject to effective external control of any kind.

Moreover, language has been used by various authorities in recent years which would support that view. Fauchille, though his words are not quite clear, appears definitely to adopt it. He quotes speeches by Lloyd George and General Smuts, made while they were both in office as Prime Ministers, in which they categorically

<sup>1</sup> Hall, 8th ed., p. 17.

<sup>2</sup> *Peace*, p. 44.

declared that the Dominions are now 'equal States.'<sup>1</sup> Duncan Hall likewise speaks without hesitation of the Dominions as having achieved 'Statehood,' and as having the qualities of 'sovereign States.'<sup>2</sup> The titles given to the Dominions on their creation are cited as further evidence of their growth to 'Statehood': Canada in 1867 styled 'Dominion,' Australia in 1900 styled 'Commonwealth,' South Africa in 1909 styled 'Union,' and Ireland in 1922 styled the 'Irish Free State.'

Moreover, certain Dominion Prime Ministers now in office have used language which, to say the least, may be held to support that view. In making his first speech to the Assembly of the League of Nations in 1923, President Cosgrave declared that the Irish Free State had been admitted 'to join a solemn Covenant to exercise the powers of her sovereign status in promoting the peace, security, and happiness . . . of the human race.'<sup>3</sup> Again, before the Imperial Conference of 1926 General Hertzog demanded the 'international recognition' of the '*independent national status*' of South Africa.<sup>4</sup> When the Conference was over he declared that the Report had satisfied his demand, and asserted that the Union had '*on proper authority* been openly acknowledged as an *independent free State*.'<sup>5</sup> Mr. Fitzgerald on December 15, 1926, declared in the Dail that 'the King acts solely upon the advice of the Government of each individual *State* in the affairs of that *State*.'<sup>6</sup> In the *inter se* clause of the Statute on Maritime Ports discussed in the last chapter, it is provided, specifically in order to cover the case of Great Britain and the Dominions, that the Statute should not apply to the relations of 'territories forming part of or placed under

<sup>1</sup> *Traité de D.I.P.*, tome i., 1<sup>ère</sup> partie, pp. 220-1.

<sup>2</sup> *British Commonwealth of Nations*, pp. 349-50.

<sup>3</sup> Proceedings of the Fourth Assembly, Sept. 1923.

<sup>4</sup> *Vide* p. 134, *supra*.

<sup>5</sup> *The Cape Times*, Dec. 21, 1926, cited by Lowell and Hall, 1927, p. 686.

<sup>6</sup> Cited by Lowell and Hall, 1927, p. 689.

the protection of the same sovereign State, whether or not these territories are *individually contracting States*.<sup>1</sup> And very many other citations of a similar kind could be made.

Yet, in spite of this evidence, it is impossible to admit that the Dominions are persons of International Law of identically the same kind as those which are called fully 'independent sovereign States.' While the existing legal and constitutional bonds described in Chapter VI. above continue to subsist, they will have both a juridical and an organic connection with the British Empire, and in consequence their mutual relations *inter se* will differ profoundly from those of the other persons of the international Society of States. They are, indeed, persons of International Law, with nearly all, if not all, the rights of other 'full persons' of that law; they are, perhaps, 'part sovereign States' if the antiquated phraseology of the nineteenth-century lawyers must still be used; but they are not wholly 'independent sovereign States' like France or Belgium.

But the truth is that the nineteenth-century phraseology of International Law no longer fits the facts. The 'independent sovereign States' of that epoch have no longer the untrammelled sovereign independence that they used to have. Brierley has pointed out this fact in the following important passage:

'State sovereignty is primarily not a legal but a philosophical conception. . . . Lawyers have been prone to treat it as an arid dogma, in spite of the fact that their science professes to be positive. . . . Yet,' he goes on, "sovereignty" or "independence" is not an entity existing apart from the facts of State life; and the words can only have a meaning for International Law in so far as they are merely compendious designations of certain qualities of modern Statehood. But we need hardly

<sup>1</sup> Vide *J.C.L.*, May 1925, p. 108.

look at the facts of State life to see that either word contains and must always have contained a dangerous *suggestio falsi*.

'The notion at the root of "sovereignty" is superiority, which may be an appropriate notion when the internal life of the State is under analysis, but to which it is difficult to give a meaning when we are examining the relations of State to State; and "independence," as Westlake pointed out, "is a negative word and therefore one that does not admit of degrees," and it would if used literally imply the impossibility of International Law altogether. It is clear, therefore, that the words must always have been used by international lawyers in some secondary derivative sense. But it is even more important to recognise that, as the bonds of international society have become closer, the words have changed, and are continually changing, their content.'

<sup>1</sup>

What is or should be the change in the content of these words 'sovereignty' and 'independence'? Brierley further on suggests the answer.

'The fundamental fact,' he says, 'which seems to lie at the root of the divorce between law and policy in international relations is that the law remains formally based on an individualistic theory of the relations of States which the States themselves have to a very large extent discarded. . . . A system of law that encourages the maximum assertion of will may be tolerable at certain times, as in the nineteenth century; but we are more and more finding it intolerable in the twentieth. . . . Yet we continue to proclaim it as the unchallengeable basis of International Law, though it is rapidly passing away also from the structure of international society.'

<sup>2</sup>

In other words, 'sovereign independence' is being replaced by 'mutual interdependence' as the real basis of International Law. That means that the actual rights and duties of 'sovereign independent States' as

<sup>1</sup> The *B. Y. I. L.*, 1924, p. 12.

<sup>2</sup> *Loc. cit.*, p. 16.

persons of International Law are being, as Brierley says, profoundly and continuously changed. Most of them are no longer free, for example, to go to war whenever they desire to do so, without consulting the other Members of the Society of States; in that respect and in many others they have limited their independence by the new rules of International Law which they have made. Their legal condition, the nature of their 'sovereignty,' if the word must still be used, has been profoundly changed. They have ceased in many ways to be 'independent' before the law, and have become in law, as they are in the facts of their social and political existence, interdependent one upon the other.

Similarly, the legal condition of the Dominions has profoundly changed. They have emerged as international persons with ever-widening rights. They have not, perhaps, an independent right to go to war; while sovereign States have been restricting their untrammelled legal 'independence' in respect of war, the Dominions have not acquired such independence for themselves. But their relations with foreign persons of the international Society of States have become continually and increasingly like the relations which those foreign persons maintain between themselves, until soon the difference, if it exists, will be very small. They are capable to-day of practically every international relationship of which 'sovereign States' are capable, and their action in those relationships is governed as between themselves and foreign States by the same rules of International Law.

This, indeed, is perhaps all we need to know about the legal 'condition' of the Dominions in International Law. If we have a precise conception of the international relations which in fact they maintain, if we have a complete and accurate idea of the legal rights and duties in International Law which they have assumed,

we may confidently neglect the battle about such words as statehood, sovereignty, and independence.<sup>1</sup>

# IS THE BRITISH EMPIRE A PERSON OF INTERNATIONAL LAW, AND IF SO, WHAT KIND OF A PERSON ?

Before any answer to this question can be attempted, a preliminary question must be dealt with : What is the British Empire ? Is it the same as the British Commonwealth of Nations to which so many references have been made, or is it different ? And, if it is different, in what respects is it different ?

In an early chapter <sup>2</sup> of this book a speech by General Hertzog was quoted in which the British Commonwealth of Nations was defined as ' the name for Great Britain and the Dominions in their free associations under the Crown.' In the same speech General Hertzog defined the British Empire as the term under which ' stand grouped the Dominions under Great Britain as well as India, Rhodesia, and other nations under the Crown which stand outside the circle of the Commonwealth of Nations.'

The present writer agrees with this distinction. In his view the British Commonwealth of Nations is not the same thing as the British Empire. It is something narrower. It is restricted to the truly self-governing units of the Empire which are represented in the Imperial Conference.<sup>3</sup> The name British Commonwealth of Nations is not a politicians' phrase ; on the contrary, it corresponds to a vitally important constitutional fact. The Commonwealth has a real existence, and the official use of its name in constitutional docu-

<sup>1</sup> Cf. Phelan, *The Sovereignty of the Irish Free State*, pp. 43 *et seqq.* His argument is that the 'sovereignty' of the Dominions is complete, but his conclusions do not greatly differ from the above.

<sup>2</sup> Vide p. 10, note 3, *supra*.  
<sup>3</sup> The author agrees with General Hertzog in thinking that India, although represented at the Imperial Conference, is not yet a true Member of the British Commonwealth.

ments like the Irish 'Treaty' and the Balfour Report is therefore fully justified in every way.

But if it is true that the name of the British Commonwealth of Nations has a real meaning in British constitutional law and practice, it is also true that it has no meaning in International Law. No entity is known by that description to foreign States. The Commonwealth as such has no relations with foreign Governments, it fulfils no functions of international concern. The only unit through which the Members of the Commonwealth have ever had *joint* relations with foreign Powers is the British Empire. The name of the British Empire *has* a meaning in International Law. It is a real unit for international purposes. It is capable of fulfilling functions of international concern. And the British Empire includes every part of the single and united realm over which the King holds sway, whether it be Great Britain, the self-governing Dominions, or the Crown Colonies and other colonial possessions which are governed from Downing Street in his name.

For what specific purposes can it be said that the British Empire, so defined, is a person of International Law? The answer is not simple or straightforward.

It has sometimes been said that the 'British Empire' is a Member of the League of Nations. If that were true, it would confer upon it personality of wide scope and great importance in International Law. But is it true?

The assertion has been made on the strength of the titles used to describe the parties to the Treaties of Peace of 1919, and to describe the original Members of the League of Nations in the Annex to the Covenant of the League. It will be remembered that at the Peace Conference of 1919, when the international status of the Dominions was for the first time receiving recognition, the British authors of the Treaties of Peace thought fit to sign

the Peace Treaties in the name of the 'British Empire' as well as in the name of the self-governing Dominions. This had the strictly legal effect, in Sir Robert Borden's phrase, of conferring upon the Dominions the doubtful benefit of 'double signature' of the Treaties of Peace.<sup>1</sup> The same nomenclature was adopted in the Annex to the Covenant of the League of Nations in which the names of the original Members of the League are set out, although the Dominions were to be separate Members of the League; and it has been repeated in a considerable number of other treaties and general conventions made under the auspices of the League, although the Dominions were separate contracting parties. This practice evidently complicates the conception of the 'British Empire,' and indeed does so to the point of confusing inextricably the meaning of the phrase. This is expressly admitted in a passage of the Balfour Report which has already been quoted,<sup>2</sup> but which may usefully be reproduced once more.

'In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex of the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire," with an enumeration of the Dominions and India if parties to the Convention, but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire." This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.'

This 'unsatisfactory' practice has led to particular confusion in regard to the point now under discussion,

<sup>1</sup> *Vide* p. 73, *supra*.

<sup>2</sup> *Cf.* p. 170, *supra*.

namely, the Membership in the League of Nations of the Members of the British Commonwealth. The Annex to the Covenant lists the British Members thus :

British Empire.

Canada.

Australia.

New Zealand.

South Africa.

India.

It has been maintained that the phrase here used, 'the British Empire,' is intended to describe the British Empire as a whole, in the meaning of the phrase as defined above ; and that therefore the British Empire as a whole must be a Member of the League. It is not denied that the Dominions are also separate Members ; so that if this argument is accepted, it involves the inevitable conclusion that the Dominions have a double Membership of the League—one Membership in their own separate name and right, and another Membership as constituent portions of the British Empire. It also involves the conclusion that the delegate of the ' British Empire ' would have the right to speak in the Assembly and the Council on behalf not only of the Government of Great Britain, but also on behalf of all the Governments in the King's realm, including the Governments of the Dominions.

One author, Pollak, appears to accept this conclusion in arguing that, because the British Empire as a whole is a Member of the League, most of the ' nationals ' of the Dominions would be ineligible to be judges of the Permanent Court of International Justice if there were already a British judge of the ' nationality ' of the British Empire.<sup>1</sup> But in fact any such conclusion is impossible to accept. Let us examine the argument by which it can be defended.

<sup>1</sup> *Vide* p. 103, note 4, *supra*.

It is based exclusively on the legal title used in the Annex to the Covenant to describe one of the Members of the British Commonwealth—that Member which in this book has been called, loosely but for convenience sake, ‘Great Britain.’ The correct title that should have been used, if strict exactitude were desired, to describe this Member of the Commonwealth and of the League, is that given in the new treaty formula drawn up by the Balfour Committee in 1926, namely : ‘Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League of Nations.’<sup>1</sup> Because a wrong title was used in the Treaties of 1919, can it be admitted that a legal consequence of such vital importance as double Dominion Membership of the League must inevitably follow ? Can it be admitted that the British delegate has the right to speak in the League for all the Governments of the Empire, when in fact the Dominion delegates have specifically and publicly denied that he can have any such right ?<sup>2</sup> Certainly not. In such a case a mere title cannot prevail against the facts of practice. And there is no single fact of practice that supports either British predominance or the hypothesis of double Membership. On the contrary, all the practice, quite apart from ‘the reason of the thing,’ shows that double Membership is an absurdity that has never been contemplated either by the Dominions or by the foreign Members of the League. Indeed, it may be confidently said that the foreign Members would never have admitted such a conception for a moment.

Moreover, the Governments of the Commonwealth have at length found it necessary to clear away the confusion which the use of the phrase ‘the British Empire’ involved. The new title quoted above : ‘Great Britain

<sup>1</sup> *Vide* p. 401, *infra*.

<sup>2</sup> Cf. pp. 85-6, *supra*.

and Northern Ireland and all parts of the British Empire which are not separate Members of the League,' is a title intended henceforward not only to describe one of the signatories of a treaty to which the Dominions are also parties, but also to describe one of the Members of the League. It is definitely intended to remove any possible doubt that there may be as to double Membership, and to clear away whatever confusion may still exist. That this is so is proved by statements made by two of the highest authorities that exist. These authorities are Sir Cecil Hurst and Sir Austen Chamberlain.

In his work which has been so frequently quoted above, Sir Cecil Hurst, in discussing the titles used in the Annex to the Covenant, has written as follows :

'The names of the States come in alphabetical order. When you reach the words "British Empire," you will see immediately after them, but set back a little so as to show that they constitute part of the British group, the names Canada, Australia, South Africa, New Zealand, and India.

'Satisfactory though the form is in one respect, in that it recognises the distinct international personality of the Dominions, it is unsatisfactory in another respect, in that it entirely omits Great Britain, and Great Britain is not a wholly negligible part of the Empire. Great Britain only finds herself within the League as an unmentioned element of the British Empire.

'How this came about it is a little difficult now to tell. It probably originated in the fact that the plenipotentiaries representing Great Britain at the Peace Conference were furnished with full powers from the King which contained no words of territorial limitation and enabled them to act on his behalf generally. Their signature to the Peace Treaty was not limited in its operation to Great Britain. Technically it applied to all the King's Dominions.

'Whatever the purpose of this arrangement in the Annex to the Covenant, it has not worked well in practice.

If the object was to lay stress on the unity of the Empire as a political entity, the effect has been the opposite, because in the ordinary work of the League it has tended to render the words "British Empire" synonymous with Great Britain and to create the impression that the Dominions were something outside the Empire. . . .

'Until the terms of the Covenant are amended and account is taken of the existence of Great Britain, it is bound to happen that for some purposes the words "British Empire" are taken as meaning Great Britain—for instance, the share of the expenses of the League which falls to the lot of the Empire must be paid by Great Britain. The Dominions, who pay their own share, could not be expected to contribute also a share of the other.'<sup>1</sup>

It appears to the present writer that Sir Cecil Hurst's intention in these passages is clear: it is to explain that the 'British Empire' is not a Member of the League: that the Member intended by that title is really 'Great Britain,' by which Sir Cecil Hurst means in fact all those parts of the Empire which are not autonomous nations and not therefore separate Members of the League. ✓

The point was made even more clearly and with even greater authority by the British Secretary of State for Foreign Affairs, Sir Austen Chamberlain, when he invited the Council of the League to suggest to international conferences summoned under the auspices of the League that they should adopt for any conventions they might make the new form of treaty proposed in the Balfour Report of 1926. On that occasion he made, *inter alia*, the following declaration:

'The Covenant of the League of Nations has omitted to take note of the fact that there is an entity Great Britain as well as the Dominions. The seat which I

<sup>1</sup> *Great Britain and the Dominions*, Harris Foundation Lectures, 1927, pp. 92-4.

occupy here and in the Assembly is attributed by the Covenant to the British Empire, but the Dominions sit in the Assembly in their own names. Great Britain appears nowhere, and the existing form of treaty concluded under the auspices of the League, therefore, causes us some inconvenience.' <sup>1</sup>

The discussion of this point, therefore, may be confidently concluded with the assertion that the 'British Empire' is not a Member of the League, and that for such purposes of International Law as are inherently and essentially connected with Membership of the League the British Empire is not therefore an effective person of International Law.

What must be said of the other general purposes of International Law outside the scope of the Covenant of the League? To go into detail would involve the repetition of much of the argument of earlier chapters. One principle may perhaps be suggested, though the writer does not put it forward with great confidence. Within the scope of the Covenant and for its purposes, the British Empire is not a person of International Law, and without the consent of the foreign Members of the League and an amendment of the Covenant it cannot become so; outside the scope of the Covenant, it may be such a person when the Members of the Commonwealth agree in desiring that it shall. It is, of course, perfectly possible that it may be such a person for some purposes, while it is not so for other purposes. Discussing this very point, Sir W. Harrison Moore has written :

'A political unit which conducts its international relations through various channels is not indeed unknown; there was a right of separate diplomatic representation in some of the states of the German Empire, and the states comprising the old Germanic confederation were represented in foreign relations both separately and through

<sup>1</sup> Statement made on March 9, 1927, cited by Toynbee, *op. cit.*, pp. 109-10.

the confederation. But an Empire which repudiates logic, and, in the language of the Conference of 1926, "defies classification and bears no resemblance to any other political organisation," undoubtedly presents the objection that it thrusts its constitutional arrangements into international relations.' <sup>1</sup>

Only time and practice will determine what are to be the 'constitutional arrangements' which are thus to be thrust into 'international relations.' Only time and practice, that is to say, will determine for what purposes of International Law the British Empire as a whole will be an effective person in that Law. There is little practice as yet which indicates that these purposes will be wide or numerous. On the contrary, present indications are, as Sir W. Harrison Moore has said, that international relations will for the most part 'be given over to severalness.' It may conceivably happen that in some matters of treaty-making the British Empire may act as a unit. How this may happen is illustrated in the following passage written by Dafoe :

'Locarno is the perfect illustration of the fact that the action of the Foreign Office of Great Britain cannot wait upon and be dependent upon approval by five overseas Governments ; under those conditions the Foreign Office could not serve the interests specially committed to its charge—those of Great Britain and its dependencies. It therefore goes ahead and attends to its affairs ; and the Dominions are perfectly willing that it should. But these policies and acts are not the acts and policies of the British Empire ; they are the policies and acts of Great Britain, one of the constituent parts of the Empire. But where the Foreign Office proposes to deal with matters in which one or all of the Dominions are affected, those Dominions being advised will come in ; and the result will be an Empire policy or instrument, as, for instance,

<sup>1</sup> *Great Britain and the Dominions*, Harris Foundation Lectures, 1927, pp. 347-8.

the 12-mile treaty negotiated with the United States on behalf of the whole Empire by the British Foreign Office in 1924.' <sup>1</sup>

It may be added, however, that the precedents of the Coolidge Conference and the Kellogg Pact, and above all, perhaps, the new fact of the Balfour Report itself, make it appear extremely unlikely that this will in fact often occur.

It is, indeed, difficult to do more than say that in all probability the British Empire will act as a single 'person' in those matters which Duncan Hall describes as 'group questions'—that is to say, certainly in matters involving the declaration of peace and war, doubtfully in other matters connected with these fundamental facts. So much is confidently asserted by Sir W. Harrison Moore :

'At least it may be assumed that the British Empire is for purposes of peace and war a single State, and not a confederacy or alliance whose Members are bound by agreement to come to each other's assistance.' <sup>2</sup>

It may therefore be concluded, not very satisfactorily, that the British Empire is still not only a political unit in the world of States, but also for certain purposes also a single unified person of International Law. What these purposes may include will depend upon the will of the Governments of the Members of the British Commonwealth, and only time and practice can decide what their scope will be.

If, then, the British Empire even for strictly limited and doubtful purposes is definitely a person of International Law, what kind of a person must it be said to be? How must it be classified and described?

<sup>1</sup> *Great Britain and the Dominions*, Harris Foundation Lectures, 1927, pp. 214-15. <sup>2</sup> *J.C.L.*, Feb. 1926, p. 34.

Some writers have asserted that its unity is now no more than a mere shadow; that the relation between the Dominions and Great Britain is no more than that of personal union; that in the person of the King is to be found the only real legal link between them; and that they are in International Law as separate as were England and Hanover in the days when George I. ruled over both, and waged war for Hanover while for England he was neutral.<sup>1</sup>

This would amount to saying that the British Empire as such had no personality at all in International Law. But in fact any such view is certainly wrong. A personal union can be ended by the death of the monarch, by differences in the law of royal succession in the different countries so united, or by the ending of a Royal house.<sup>2</sup> In no such way could the union between the Members of the British Commonwealth be ended.

Other writers, recognising that the British Empire is more than a personal union, have declared that it is what international lawyers call a 'Confederation of States' or a 'Staatenbund.' Fauchille has tentatively expressed this view, and has supported it with a lengthy argument about the nature of a Staatenbund.<sup>3</sup> Lewis arrives more or less at the same conclusion, and says that the Empire now 'shows a tendency to develop in the direction of a . . . Staatenbund.'<sup>4</sup> He borrows for his purpose the definition of a Staatenbund given by Wheaton many years ago.

'The several states,' says Wheaton, 'are connected together by a compact which does not essentially differ from an ordinary treaty of alliance. Consequently the internal sovereignty of each member of the union remains

<sup>1</sup> This view is expressed by Zimmern (*The Third British Empire*, p. 49).

<sup>2</sup> Cf. Westlake, *Peace*, p. 41. The personal union between Great Britain and Hanover lasted from 1714 to 1837, and was ended by the

operation of the Salic Law preventing the succession of Queen Victoria to the Hanoverian throne.

<sup>3</sup> Vide *Traité de D.I.P.*, tome i. pp. 241 *et seqq.*

<sup>4</sup> *B.Y.I.L.*, 1922-S, p. 39.

unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate Government adopting them and giving them the force of law without its own jurisdiction. Hence it follows that each confederated individual state and the federal body for the affairs of common interest may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations.' <sup>1</sup>

This definition makes of a Staatenbund a good deal closer an association than does that of Fauchille. For him a Staatenbund is 'une association plus politique que juridique d'états indépendants qui ne reconnaissent pas une autorité commune, à la fois supérieure et suprême'; it is a 'composé d'états beaucoup plus qu'un état composé.' But even Wheaton's definition is too loose really to fit the facts of the British Commonwealth. For the essential fact about that Commonwealth is that the relation between the Members of the confederation is much more than that of an alliance; it is in its essence a *constitutional* relation. The Members remain parts of a single constitutional system. The truth, indeed, probably is, as Lord Balfour's Committee remarked in 1926, that the Empire 'defies classification, and bears no resemblance to any other political organisation which now exists or has ever yet been tried.' <sup>2</sup>

But again this fact need not trouble us. We know the facts about the nature of the Dominions as separate international persons, and about the Empire as a single whole. There is nothing new in International Law, as Sir W. Harrison Moore has said, and as, indeed, Wheaton's nineteenth-century definition serves to show us, in the existence side by side of separate constitutional units and a federal whole, each of which is 'in its appropriate sphere the object of distinct diplomatic relations with other

<sup>1</sup> Wheaton's *International Law*, 1878 ed., p. 57.

<sup>2</sup> Cmd. 2768 (1926), p. 11.

nations.’<sup>1</sup> This is, indeed, but one result of the fact that ‘sovereignty’ is infinitely divisible. Thus the Dominions and Great Britain, being separate persons in International Law, are bound together by many legal bonds in British constitutional law, and may also act together as a group or unit in some of their international relations. So long as they continue to do so, and so long as they maintain their present constitutional relation, each of them must forgo, under constitutional conventions about ‘consultation,’ ‘group questions,’ and the rest, a part of its liberty of action. Therein, as Lewis says, ‘they differ in international status from a normal unitary and independent state.’<sup>2</sup>

Thus the Dominions and Great Britain are separate persons of International Law, but persons who are in a ‘special relationship’ with each other, a relationship not known by other international persons, a relationship which is nothing less than a true legal ‘partnership’ for common ends. This partnership, founded on constitutional law, vivified by the daily action of the partners in their intercourse with foreign States, makes of them when they act together as a group, as they sometimes do,

<sup>1</sup> Cf. also Oppenheim, *International Law*, 4th ed., 1928, i. p. 200: ‘In the editor’s [i.e. McNair’s] opinion it is *sui generis* and defies classification. It is not a Federal State because there is no organ which, in fact as opposed to legal theory, has power both over the member-States and their citizens. It is not a Confederation because there is no treaty which unites the member-States and no organ which in fact has power over them. It is not a Real Union because there is no treaty which unites the member-States and because each of the Dominions can enter into separate treaties, and “full powers” to sign them are issued upon the advice of the Dominion Cabinet. It is not a Personal Union because it is the essence of that relationship that two or more distinct Crowns should be

accidentally (and often temporarily) united in the same holder, and may even (as in the case of Great Britain and Hanover) be governed by different laws of descent, whereas “the Crown in the British Empire is one and undivided.”’

Cf. also Oppenheim, *International Law*, i. pp. 138-9: ‘Whenever a Federal State comes into existence which leaves the member-States for some parts International Persons, the recognition granted to it by foreign States must include their readiness to recognise for the future, on the one hand, the body of the member-States, and, on the other, the Federal State, as one composite International Person regarding all important matters.’

<sup>2</sup> *B. Y. I. L.*, 1922-3, p. 40.

a single entity in the Society of States, an entity still called, for want of a better name, the British Empire.

Some critics see in the tendency towards 'severalness' in the practice of the Governments of the British Commonwealth in their international affairs something to be regretted, distrusted, or even combated. To them the whole development of the international status of the Dominions is a mistake. Such critics would do well to remember that a British Secretary of State for the Colonies, Lord Ripon, maintained in a famous circular to the Dominions in 1895 that a Dominion right to negotiate commercial treaties through their own agents and without the co-operation of British diplomats would dissolve the Empire and could never be allowed. No one believes that the development of the international status of the Dominions is yet complete.<sup>1</sup> But one thing is certain. Whatever expansion that status may yet receive, whatever development in the effective international action of the Dominions may yet occur, it will not imperil the political solidarity of the British Commonwealth, provided only that, in the spirit of the Balfour Report of 1926, it be freely and generously accepted by the Mother-country. For the history of the British Empire in the last hundred years has proved one thing beyond all doubt or question: that it is not by legal or constitutional restrictions, but only by voluntary co-operation in unrestricted freedom, that a community of self-governing nations can work together in unity and peace. As the legal and constitutional bonds between them have seemed to weaken or diminish, so the real strength of the whole political structure has in fact increased; and who can doubt that as it has been in the past, so it will be still in years to come?

<sup>1</sup> Cf. Rt. Hon. W. Mackenzie King, in the *Canadian National* for April 1929 (cited in *Times*, April 16, 1929): 'Whether we like it or not, our country cannot escape rapid growth in her international relations.'

## APPENDIX I

### THE COVENANT OF THE LEAGUE OF NATIONS, WITH AMENDMENTS IN FORCE ON MARCH 31, 1928

#### [THE PREAMBLE]

##### THE HIGH CONTRACTING PARTIES,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,  
by the prescription of open, just, and honourable relations  
between nations,

by the firm establishment of the understandings of International Law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

#### ARTICLE I [MEMBERSHIP]

The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant, and also such of those other states named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion, or Colony not named in the Annex may become a member of the League, if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

## ARTICLE 2 [EXECUTIVE MACHINERY]

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

## ARTICLE 3 [ASSEMBLY]

The Assembly shall consist of representatives of the Members of the League.

The Assembly shall meet at stated intervals and from time to time as occasion may require at the Seat of the League or at such other place as may be decided upon.

The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

At meetings of the Assembly each Member of the League shall have one vote, and may have not more than three Representatives.

## ARTICLE 4 [COUNCIL]

The Council shall consist of Representatives of the Principal Allied and Associated Powers,<sup>1</sup> together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain, and Greece shall be members of the Council.

With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council;<sup>2</sup> the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.<sup>3</sup>

The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.

The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

<sup>1</sup> The Principal Allied and Associated Powers are the following: The United States of America, the British Empire, France, Italy, and Japan (see Preamble of the Treaty of Peace with Germany).

<sup>2</sup> In virtue of this paragraph of the Covenant, Germany was nominated as a permanent Member of the Council on 8th September 1926.

<sup>3</sup> The number of Members of the Council selected by the Assembly was increased to six instead of four by virtue of a resolution adopted at the Third ordinary meeting of the Assembly on 25th September 1922. By a resolution taken by the Assembly on 8th September 1926, the number of Members of the Council selected by the Assembly was increased to nine.

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

#### ARTICLE 5 [VOTING AND PROCEDURE]

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council, and may be decided by a majority of the Members of the League represented at the meeting.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

#### ARTICLE 6 [SECRETARIAT]

The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council.

The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.

#### ARTICLE 7 [SEAT. QUALIFICATIONS FOR OFFICIALS. IMMUNITIES]

The Seat of the League is established at Geneva.

The Council may at any time decide that the Seat of the League shall be established elsewhere.

All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

#### ARTICLE 8 [REDUCTION OF ARMAMENTS]

The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

Such plans shall be subject to reconsideration and revision at least every ten years.

After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval, and air programmes, and the condition of such of their industries as are adaptable to warlike purposes.

#### ARTICLE 9 [PERMANENT MILITARY COMMISSION]

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval, and air questions generally.

#### ARTICLE 10 [GUARANTEES AGAINST AGGRESSION]

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

#### ARTICLE 11 [ACTION IN CASE OF WAR OR DANGER OF WAR]

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any

action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

#### ARTICLE 12 [DISPUTES TO BE SUBMITTED TO ARBITRATION OR INQUIRY]

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or *judicial settlement* or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the *judicial decision* or the report by the Council.

In any case under this Article the award of the arbitrators or the *judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

#### ARTICLE 13 [ARBITRATION OF DISPUTES]

The Members of the League agree that, whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or *judicial settlement*, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or *judicial settlement*.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or *judicial settlement*.

*For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*

The Members of the League agree that they will carry out in full good faith any award or *decision* that may be rendered, and that they will not resort to war against any Member of the League that complies therewith. In the event of any failure to carry out such an award or *decision*, the Council shall propose what steps should be taken to give effect thereto.

## ARTICLE 14 [PERMANENT COURT OF INTERNATIONAL JUSTICE]

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

## ARTICLE 15 [DISPUTES NOT SUBMITTED TO ARBITRATION]

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or *judicial settlement* in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by

International Law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the Members thereof other than the Representatives of one or more of the parties to the dispute.

#### ARTICLE 16 ['SANCTIONS' OF THE LEAGUE]

<sup>1</sup> Should any member of the League resort to war in disregard of its covenants under Article 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

<sup>1</sup> Article 16, as amended, reads:

Should any Member of the League resort to war in disregard of its covenants under Article 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the Covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between persons residing in the territory of the Covenant-breaking State and persons residing in the territory of any other State, whether a Member of the League or not.

It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council,

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the Covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other members of the League represented thereon.

#### ARTICLE 17 [DISPUTES WITH NON-MEMBERS]

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted.

The Council will notify to all Members of the League the date which it recommends for the application of the economic pressure under this Article.

Nevertheless, the Council may, in the case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such members.

ARTICLE 18 [REGISTRATION AND PUBLICATION OF ALL  
FUTURE TREATIES]

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

## ARTICLE 19 [REVIEW OF TREATIES]

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

## ARTICLE 20 [ABROGATION OF INCONSISTENT OBLIGATIONS]

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

## ARTICLE 21 [ENGAGEMENTS THAT REMAIN VALID]

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

ARTICLE 22 [MANDATORIES, CONTROL OF COLONIES AND  
TERRITORIES]

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience, or their geographical position can best undertake this responsibility,

and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

#### ARTICLE 23 [SOCIAL ACTIVITIES]

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League :

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations ;

(b) undertake to secure just treatment of the native inhabitants of territories under their control ;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs ;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest ;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind ;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

#### ARTICLE 24 [INTERNATIONAL BUREAUX]

There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

#### ARTICLE 25 [PROMOTION OF RED CROSS]

The Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease, and the mitigation of suffering throughout the world.

## ARTICLE 26 [AMENDMENTS]

<sup>1</sup> Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

## ANNEX

## I. [STATES QUALIFIED TO BE] ORIGINAL MEMBERS OF THE LEAGUE OF NATIONS

## SIGNATORIES OF THE TREATY OF PEACE

United States of America.	Cuba.	Nicaragua.
Belgium.	Ecuador.	Panama.
Bolivia.	France.	Peru.
Brazil.	Greece.	Poland.
British Empire.	Guatemala.	Portugal.
Canada.	Haiti.	Roumania:
Australia.	Hedjaz.	Serb-Croat-Slovene
South Africa.	Honduras.	State.
New Zealand.	Italy.	Siam.
India.	Japan.	Czecho-Slovakia.
China.	Liberia.	Uruguay.

## STATES INVITED TO ACCEDE TO THE COVENANT

Argentine Republic.	Norway.	Sweden.
Chile.	Paraguay.	Switzerland.
Colombia.	Persia.	Venezuela.
Denmark.	Salvador.	
Netherlands.	Spain.	

## II. FIRST SECRETARY-GENERAL OF THE LEAGUE OF NATIONS

The Honourable Sir James Eric Drummond, K.C.M.G., C.B.

<sup>1</sup> Article 26, as amended, reads :

Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the Members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.

If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.

The Secretary-General shall inform the members of the taking effect of an amendment.

Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case it shall cease to be a member of the League.

## APPENDIX II

### REPORT OF THE INTER-IMPERIAL RELATIONS COMMITTEE OF THE IMPERIAL CONFERENCE OF 1926. (Cmd. 2768, 1926.)

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I. Introduction.—We were appointed at the meeting of the Imperial Conference on the 25th October, 1926, to investigate all the questions on the agenda affecting Inter-Imperial Relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved consideration of fundamental principles affecting the relations of the various parts of the British Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal has been all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build.

II. Status of Great Britain and the Dominions.—The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appro-

priate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this Report will show how we have endeavoured not only to state political theory, but to apply it to our common needs.

III. *Special Position of India.*—It will be noted that in the previous paragraphs we have made no mention of India. Our reason for limiting their scope to Great Britain and the Dominions is that the position of India in the Empire is already defined by the Government of India Act, 1919. We would, nevertheless, recall that by Resolution IX. of the Imperial War Conference, 1917, due recognition was given to the important position held by India in the British Commonwealth. Where, in this Report, we have had occasion to consider the position of India, we have made particular reference to it.

IV. *Relations between the Various Parts of the British Empire.*—Existing administrative, legislative, and judicial forms are admittedly not wholly in accord with the position as described in Section II. of this Report. This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development. Our first task then was to examine these forms with special reference to any cases where the want of adaptation of practice to principle caused, or might be thought to cause, inconvenience in the conduct of Inter-Imperial Relations.

(a) *The Title of His Majesty the King.*—The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last fifty years has the royal title been altered to suit changed conditions and constitutional developments.

The present title, which is that proclaimed under the Royal Titles Act of 1901, is as follows :

‘George V., by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.’

Some time before the Conference met, it had been recognised that this form of title hardly accorded with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It had further been ascertained that it would be in accordance with His Majesty's wishes that any recommendation for change should be submitted to him as the result of discussion at the Conference.

We are unanimously of opinion that a slight change is desirable, and we recommend that, subject to His Majesty's approval, the

necessary legislative action should be taken to secure that His Majesty's title should henceforward read :

'George V., by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.'

(b) *Position of Governors-General.*—We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor-General<sup>1</sup> as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

It seemed to us to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and His Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional position of the Governor-General. It was thought that the recognised official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain readily recognised that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had completed its work, but it was recognised by the Committee, as an essential feature of any change or development in the channels of communication, that a Governor-General should be supplied with copies of all documents of importance and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.

(c) *Operation of Dominion Legislation.*—Our attention was also called to various points in connection with the operation of Dominion legislation which, it was suggested, required clarification.

<sup>1</sup> The Governor of Newfoundland is in the same position as the Governor-General of a Dominion.

The particular points involved were :

- (a) The present practice under which Acts of the Dominion Parliaments are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs, that ' His Majesty will not be advised to exercise his powers of disallowance ' with regard to them.
- (b) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which is signified on advice tendered by His Majesty's Government in Great Britain.
- (c) The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.
- (d) The operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal statutes based upon consultation and agreement.

We gave these matters the best consideration possible in the limited time at our disposal, but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a statement of certain principles which, in our opinion, underlie the whole question of the operation of Dominion legislation. We felt that, for the rest, it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions.

On the questions raised with regard to disallowance and reservation of Dominion legislation, it was explained by the Irish Free State representatives that they desired to elucidate the constitutional practice in relation to Canada, since it is provided by Article 2 of the Articles of Agreement for a treaty of 1921 that ' the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada. '

On this point we propose that it should be placed on record that, apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the

affairs of a Dominion against the views of the Government of that Dominion.

The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.

As already indicated, however, we are of opinion that there are points arising out of these considerations, and in the application of these general principles, which will require detailed examination, and we accordingly recommend that steps should be taken by Great Britain and the Dominions to set up a Committee with terms of reference on the following lines :

'To inquire into, report upon, and make recommendations concerning :

- (i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation.
- (ii)—(a) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation. (b) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.
- (iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this Report.'

(d) *Merchant Shipping Legislation*.—Somewhat similar considerations to those set out above governed our attitude towards a similar, though a special, question raised in relation to merchant shipping legislation. On this subject it was pointed out that, while uniformity of administrative practice was desirable, and indeed essential, as regards the merchant shipping legislation of the various parts of the Empire, it was difficult to reconcile the application, in their present form, of certain provisions of the

principal statute relating to merchant shipping, viz. the Merchant Shipping Act of 1894, more particularly Clauses 735 and 736, with the constitutional status of the several members of the British Commonwealth of Nations.

In this case also we felt that, although, in the evolution of the British Empire, certain inequalities had been allowed to remain as regards various questions of maritime affairs, it was essential in dealing with these inequalities to consider the practical aspects of the matter. The difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt, amongst other matters, with the registration of British ships all over the world) were fully appreciated, and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's consuls in the interest of British shipping and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad.

We came finally to the conclusion that, following a precedent which had been found useful on previous occasions, the general question of merchant shipping legislation had best be remitted to a special Sub-Conference, which could meet most appropriately at the same time as the Expert Committee to which reference is made above. We thought that this special Sub-Conference should be invited to advise on the following general lines :

'To consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted.'

We took note that the representatives of India particularly desired that India, in view of the importance of her shipping interests, should be given an opportunity of being represented at the proposed Sub-Conference. We felt that the full representation of India on an equal footing with Great Britain and the Dominions would not only be welcomed, but could very properly be given, due regard being had to the special constitutional position of India as explained in Section III. of this Report.

(e) *Appeals to the Judicial Committee of the Privy Council.*—Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was,

however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case.

V. Relations with Foreign Countries.—From questions specially concerning the relations of the various parts of the British Empire with one another, we naturally turned to those affecting their relations with foreign countries. In the latter sphere, a beginning had been made towards making clear those relations by the Resolution of the Imperial Conference of 1923 on the subject of the negotiation, signature, and ratification of treaties.<sup>1</sup>

But it seemed desirable to examine the working of that Resolution during the past three years and also to consider whether

<sup>1</sup> This Resolution was as follows :

‘The Conference recommends for the acceptance of the Governments of the Empire represented that the following procedure should be observed in the negotiation, signature, and ratification of international agreements.

‘The word “treaty” is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between heads of states, signed by plenipotentiaries provided with full powers issued by the heads of the states, and authorising the holders to conclude a treaty.’

## I.

### ‘1. *Negotiation.*

‘(a) It is desirable that no treaty should be negotiated by any of the Governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

‘(b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other Governments of the Empire likely to be interested are informed, so that, if any such Government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

‘(c) In all cases where more than one of the Governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those Governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilised to attain this object.

‘(d) Steps should be taken to ensure that those Governments of the Empire whose representatives are not participating in the negotiations

the principles laid down with regard to treaties could not be applied with advantage in a wider sphere.

(a) *Procedure in relation to Treaties.*—We appointed a special Sub-Committee under the Chairmanship of the Minister of Justice of Canada (the Honorable E. Lapointe, K.C.) to consider the question of treaty procedure.

The Sub-Committee, on whose report the following paragraphs are based, found that the Resolution of the Conference of 1923 embodied on most points useful rules for the guidance of the Governments. As they became more thoroughly understood and established, they would prove effective in practice.

should, during their progress, be kept informed in regard to any points arising in which they may be interested.

## ‘2. *Signature.*

‘(a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part. The full power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

‘(b) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the Governments concerned.

‘(c) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the Governments of the Empire represented at the Conference should be continued, and the full powers should be in the form employed at Paris and Washington.

## ‘3. *Ratification.*

‘The existing practice in connection with the ratification of treaties should be maintained.

## II.

‘Apart from treaties made between heads of states, it is not unusual for agreements to be made between Governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory Governments, and signed by representatives of those Governments, who do not act under full powers issued by the heads of the states: they are not ratified by the heads of the states, though in some cases some form of acceptance or confirmation by the Governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the Governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the Government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views.’

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connection with part I. (3), setting out the existing procedure in relation to the ratification of treaties. This procedure is as follows:

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the Government of that part:

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned. It is for each Government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that Government.

Some phases of treaty procedure were examined, however, in greater detail in the light of experience in order to consider to what extent the Resolution of 1923 might with advantage be supplemented.

*Negotiation.*—It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments, and should take steps to inform Governments likely to be interested of its intention.

This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comment will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorised to act on its behalf, it will advise the appointment of a plenipotentiary so to act.

*Form of Treaty.*—Some treaties begin with a list of the contracting countries and not with a list of heads of states. In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term 'British Empire' with an enumeration of the Dominions and India if parties to the Convention, but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term 'British Empire.' This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between Governments) whether negotiated under the auspices of the League or not

should be made in the name of heads of states, and, if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order : Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's Report.<sup>1</sup>

In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentences gives expression underlies all international conventions.

In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form of a treaty between heads of states should be avoided.

*Full Powers.*—The plenipotentiaries for the various British units should have full powers issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such Government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

*Signature.*—In the cases where the names of countries are

<sup>1</sup> See pp. 401-2.

appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty? The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.

*Coming into Force of Multilateral Treaties.*—In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connection with treaties negotiated under the auspices of the League whether, for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate members of the League should be counted as separate ratifications. In order to avoid any difficulty in future, it is recommended that, when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate members of the League.

We think that some convenient opportunity should be taken of explaining to the other members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various Governments of the Empire should make it an instruction to their representatives at International Conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.

(b) *Representation at International Conferences.*—We also studied, in the light of the Resolution of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at International Conferences. The conclusions which we reached may be summarised as follows:

1. No difficulty arises as regards representation at conferences convened by, or under the auspices of, the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph 1. 1 (c) of the Treaty Resolution of 1923.

2. As regards International Conferences summoned by foreign Governments, no rule of universal application can be laid down, since the nature of the representation must, in part,

depend on the form of invitation issued by the convening Government.

- (a) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary efforts should be made to secure invitations which will render such representation possible.
- (b) Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case.

It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the conference, or whether it is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and to accept the result.

If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received. •

Where more than one part of the Empire desires to be represented, three methods of representation are possible :

- (i) By means of a common plenipotentiary or plenipotentiaries the issue of full powers to whom should be on the advice of all parts of the Empire participating.
- (ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.
- (iii) By separate delegations representing each part of the Empire participating in the conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.

(c) *General Conduct of Foreign Policy.*—We went on to examine the possibility of applying the principles underlying the Treaty Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally. It was frankly recognised that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the conduct of foreign relations, particularly those with foreign countries on their borders. A particular instance of this is the growing work in connection with the relations between Canada and the United States of America which has led to the necessity for the appointment of a minister plenipotentiary to represent the Canadian Government in Washington. We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments. In the light of this governing consideration, the Committee agreed that the general principle expressed in relation to treaty negotiations in Section v. (a) of this Report, which is indeed already to a large extent in force, might usefully be adopted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.

(d) *Issue of Exequaturs to Foreign Consuls in the Dominions.*—A question was raised with regard to the practice regarding the issue of exequaturs to consuls in the Dominions. The general practice hitherto, in the case of all appointments of consuls de carrière in any part of the British Empire, has been that the foreign Government concerned notifies His Majesty's Government in Great Britain, through the diplomatic channel, of the proposed appointment, and that, provided that it is clear that the person concerned is, in fact, a consul de carrière, steps have been taken, without further formality, for the issue of His Majesty's exequatur. In the case of consuls other than those de carrière, it has been customary for some time past to consult the Dominion Government concerned before the issue of the exequatur.

The Secretary of State for Foreign Affairs informed us that His Majesty's Government in Great Britain accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as consul in a Dominion should be referred to the Dominion Government concerned for consideration, and that, if the Dominion Government agreed to the issue of the exequatur, it would be sent to them for counter-signature by a Dominion minister. Instructions to this effect had indeed already been given.

(e) *Channel of Communication between Dominion Governments and Foreign Governments.*—We took note of a development of special interest which had occurred since the Imperial Conference last met, viz. the appointment of a minister plenipotentiary to represent the interests of the Irish Free State in Washington, which was now about to be followed by the appointment of a diplomatic representative of Canada. We felt that most fruitful results could be anticipated from the co-operation of His Majesty's representatives in the United States of America, already initiated, and now further to be developed. In cases other than those where Dominion ministers were accredited to the heads of foreign states, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

VI. *System of Communication and Consultation.*—Sessions of the Imperial Conference at which the Prime Ministers of Great Britain and of the Dominions are all able to be present cannot, from the nature of things, take place very frequently. The system of communication and consultation between conferences becomes therefore of special importance. We reviewed the position now reached in this respect with special reference to the desirability of arranging that closer personal touch should be established between Great Britain and the Dominions, and the Dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. Development, in this respect, seems particularly necessary in relation to matters of major importance in foreign affairs where expedition is often essential, and urgent decision necessary. A special aspect of the question of consultation which we considered was that concerning the representation of Great Britain in the Dominions. By reason of a constitutional position, as explained in Section iv. (b) of this Report, the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one therefore in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain.

We summed up our conclusions in the following Resolution, which is submitted for the consideration of the Conference :

The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments in Great Britain and the Dominions, with due regard

to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government and the special arrangements which have been in force since 1918 for communications between Prime Ministers.'

VII. Particular Aspects of Foreign Relations discussed by Committee.—It was found convenient that certain aspects of foreign relations on matters outstanding at the time of the Conference should be referred to us, since they could be considered in greater detail, and more informally, than at meetings of the full Conference.

(a) *Compulsory Arbitration in International Disputes*.—One question which we studied was that of arbitration in international disputes, with special reference to the question of acceptance of Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the Court. On this matter we decided to submit no Resolution to the Conference, but, whilst the members of the Committee were unanimous in favouring the widest possible extension of the method of arbitration for the settlement of international disputes, the feeling was that it was at present premature to accept the obligations under the Article in question. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court, without bringing up the matter for further discussion.

(b) *Adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice*.—Connected with the question last mentioned, was that of adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.

The special conditions upon which the United States desired to become a party to the Protocol had been discussed at a special Conference held in Geneva in September 1926, to which all the Governments represented at the Imperial Conference had sent representatives. We ascertained that each of these Governments was in accord with the conclusions reached by the special Conference and with the action which that Conference recommended.

(c) *The Policy of Locarno*.—The Imperial Conference was fortunate in meeting at a time just after the ratifications of the Locarno Treaty of Mutual Guarantee had been exchanged on the entry of Germany into the League of Nations. It was therefore possible to envisage the results which the Locarno Policy had achieved already, and to forecast to some extent the further results which it was hoped to secure. These were ex-

plained and discussed. It then became clear that, from the standpoint of all the Dominions and of India, there was complete approval of the manner in which the negotiations had been conducted and brought to so successful a conclusion.

Our final and unanimous conclusion was to recommend to the Conference the adoption of the following Resolution :

'The Conference has heard with satisfaction the statement of the Secretary of State for Foreign Affairs with regard to the efforts made to ensure peace in Europe, culminating in the agreements of Locarno; and congratulates His Majesty's Government in Great Britain on its share in this successful contribution towards the promotion of the peace of the world.'

Signed on behalf of the Committee,  
BALFOUR, *Chairman*.

November 18, 1926.

## APPENDIX

(See Section v. (a).)

### SPECIMEN FORM OF TREATY

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King [*here insert His Majesty's full title*], His Majesty the King of Bulgaria, etc., etc.

Desiring .....

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries : .....

The President.....  
.....

His Majesty the King [*title as above*] :

for Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League (of Nations),  
AB.

for the Dominion of Canada,  
CD.

for the Commonwealth of Australia,  
EF.

for the Dominion of New Zealand,  
GH.

for the Union of South Africa,  
IJ.

for the Irish Free State,  
KL.

for India,  
MN.

.....  
 who, having communicated their full powers, found in good and  
 due form, have agreed as follows :  
 .....

In faith whereof the above-named Plenipotentiaries have  
 signed the present Treaty.

*AB*.....  
*CD*.....  
*EF*.....  
*GH*.....  
*IJ*.....  
*KL*.....  
*MN*.....

(or if the territory for which each Plenipotentiary signs is to  
 be specified :

(for Great Britain, etc.).....*AB*.  
 (for Canada) ..... *CD*.  
 (for Australia) .....*EF*.  
 (for New Zealand) .....*GH*.  
 (for South Africa) .....*IJ*.  
 (for the Irish Free State) .....*KL*.  
 (for India) .....*MN*.)

## APPENDIX III

### DOMINIONS WHICH HAVE RATIFIED LABOUR CONVENTIONS BY MEANS OF ORDER-IN-COUNCIL

#### AUSTRALIA

Convention for establishing facilities for finding employment for seamen (Second Session, 1920), *Order in Council of 10 June, 1925*. (Ratification registered on 3 August, 1925.)

#### CANADA

1. Convention fixing the minimum age for admission of children to employment at sea (Second Session, 1920).
  2. Convention concerning unemployment indemnity in case of loss or foundering of the ship (Second Session, 1920).
  3. Convention fixing the minimum age for the admission of young persons to employment as trimmers or stokers (Third Session, 1921).
  4. Convention concerning the compulsory medical examination of children and young persons employed at sea (Third Session, 1921).
- Order in Council of 11 March, 1926*. (Ratification registered on 31 March, 1926.)

#### IRISH FREE STATE

- I. 1. Convention concerning the rights of association and combination of agricultural workers (Third Session, 1921).
  2. Convention concerning workmen's compensation in agriculture (Third Session, 1921).
- Order of the Executive Council of 12 June, 1924*. (Ratification registered on 17 June, 1924.)
- II. Convention concerning the age for admission of children to employment in agriculture (Third Session, 1921).
- Order of the Executive Council of 16 May, 1925*. (Ratification registered on 26 May, 1925.)

- III. 1. Convention concerning unemployment (First Session, 1919).  
 2. Convention concerning employment of women during the night (First Session, 1919).  
 3. Convention fixing the minimum age for admission of children to industrial employment (First Session, 1919).  
 4. Convention concerning the night work of young persons employed in industry (First Session, 1919).  
 5. Convention fixing the minimum age for admission of children to employment at sea (Second Session, 1920).  
*Order of the Executive Council of 12 August, 1925.* (Ratification registered on 4 September, 1925.)  
 IV. Convention concerning workmen's compensation for occupational diseases (Seventh Session, 1925).  
*Order of the Executive Council of 8 November, 1927.* (Ratification registered on 25 November, 1927.)

#### SOUTH AFRICA

- I. Convention concerning employment of women during the night (First Session, 1919).  
*Executive Council Minute of 26 September, 1921.* (Ratification registered on 1 November, 1921.)  
 II. Convention concerning unemployment (First Session, 1919).  
*Executive Council Minute of 29 October, 1923.* (Ratification registered on 20 February, 1924.)  
 III. Convention concerning equality of treatment for national and foreign workers as regards workmen's compensation for accidents (Seventh Session, 1925).  
*Executive Council Minute of 19 March, 1926.* (Ratification registered on 30 March, 1926.)

### INSTRUMENT OF RATIFICATION OF EMPLOYMENT FOR SEAMEN CONVENTION

#### AUSTRALIA

*Order in Council.*

#### ORDER

Commonwealth of Australia, to wit,  
 FORSTER,  
 Governor-General.

By His Excellency the  
 Governor-General of  
 the Commonwealth  
 of Australia.

WHEREAS the second session of the International Labour Conference held at Genoa adopted, on 10th July, 1920, a draft convention for establishing facilities for finding employment for seamen ;

AND WHEREAS the Secretary-General of the League of Nations has duly communicated to the Government of the Commonwealth of Australia a certified copy of the said draft convention :

AND WHEREAS by Article 405 of the Treaty of Versailles it is provided that in the case of a draft convention so communicated to members of the International Labour Organisation, each member shall, if such draft convention obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification thereof to the Secretary-General of the League of Nations :

AND WHEREAS such draft convention has, in respect of the Commonwealth of Australia, obtained the consent of the authority or authorities within whose competence the matter lies, and, so far as the subject-matter is within the legislative competence of the Parliament of the Commonwealth of Australia, such action as is necessary to make the provisions of the said draft convention effective has been taken :

NOW THEREFORE I, Henry William Baron Forster, the Governor-General aforesaid, acting with the advice of the Federal Executive Council, do hereby order that the said draft convention be confirmed and approved, and that formal communication thereof be made to the Secretary-General of the League of Nations, and further, do hereby declare that nothing in the said draft convention shall apply to the Territories of Papua and Norfolk Island and the Mandated Territories of New Guinea and Nauru.

Given under my Hand and Seal of the Commonwealth,  
 at Melbourne, this tenth day of June, in the year  
 (L.S.) of Our Lord, One thousand nine hundred and  
 twenty-five, and in the sixteenth year of His  
 Majesty's reign.

By His Excellency's Command,

C. W. C. MARR, for Prime Minister.

GOD SAVE THE KING !

## INSTRUMENT OF RATIFICATION OF FOUR CONVENTIONS

CANADA

*Order in Council.*

P.C. 357.

At the Government House at Ottawa,  
 Thursday, the 11th day of March 1926.

*Present :*

HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL.

WHEREAS at the Second Session of the General Conference of the International Labour Organisation of the League of Nations

held at Genoa on July 9, 1920, two Draft Conventions were adopted (a) fixing the minimum age for admission of children to employment at sea ; (b) concerning unemployment indemnity in case of loss or foundering of a ship ;

AND WHEREAS at the Third Session of the said Conference two other Draft Conventions were adopted, at the meeting held at Geneva on November 11, 1921, (a) fixing the minimum age for the admission of young persons to employment as trimmers or stokers ; (b) concerning the compulsory medical examination of children and young persons employed at sea. At these Conferences Canada has been duly represented ;

AND WHEREAS these four Draft Conventions have been incorporated in an Act to amend the Canada Shipping Act which was assented to July 19, 1924, and published as 14-15 George V. chap. 12 ;

AND WHEREAS by a Minute of Council approved on October 8, 1925 (P.C. 1828), authority was granted for the issue of a proclamation to bring the above Act into effect on January 1, 1926, for the adhesion of Canada to the four Draft Conventions enumerated above, and for taking the necessary steps for their ratification ;

THEREFORE His Excellency the Governor-General in Council, on the recommendation of the Secretary of State for External Affairs, and with the concurrence of the Acting Minister of Labour, is pleased to confirm and doth hereby confirm and approve the above four Draft Conventions on behalf of Canada ; formal communication of such ratification to be made to the Secretary-General of the League of Nations and to the Secretary of State for Dominion Affairs.

(Signed) E. J. LEMAIRE,  
Clerk of the Privy Council.

## INSTRUMENT OF RATIFICATION OF UNEMPLOYMENT CONVENTION

### IRISH FREE STATE

*Order of the Executive Council.*

WHEREAS on the 19th March, 1924, the Secretary-General of the League of Nations communicated to the Government of the Irish Free State a certified copy of the Draft Convention concerning Unemployment which had been adopted by the Labour Conference at Washington on the 28th November, 1919 ;

AND WHEREAS it is provided by Article 405 of the Treaty of Versailles that in the case of a Draft Convention so communicated each member of the Labour Organisation shall, if such

Draft Convention obtain the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification thereof to the Secretary-General of the League of Nations;

AND WHEREAS the provisions of the said Draft Convention are capable of being applied within the Irish Free State;

AND WHEREAS the Oireachtas has by resolution recommended the Executive Council to ratify the said Draft Convention in respect of the Irish Free State;

NOW THEREFORE, the Executive Council is pleased to order and it is hereby ordered that the said Draft Convention be ratified accordingly, and that formal communication thereof be made to the Secretary-General of the League of Nations.

(Signed) DERMOT O'HEGARTY,

Runai Do'n Ard-Chomhairle

(Secretary to the Executive Council).

DUBLIN, *this 12th day of August 1925.*

## INSTRUMENT OF RATIFICATION OF UNEMPLOYMENT CONVENTION

### SOUTH AFRICA

*Executive Council Minute.*

No. 3045.

Prime Minister's Office,  
Pretoria, 20th September, 1923.

MINISTERS have the honour to recommend that :

WHEREAS the General Conference of the International Labour Organisation of the League of Nations, convened at Washington, United States of America, on the 29th October, 1919, adopted a Draft Convention concerning unemployment ; and

WHEREAS it is provided in Article 405 of the Treaty of Versailles that, in the case of a Draft Convention so adopted, each member of the Labour Organisation shall, if such Draft Convention obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification thereof to the Secretary-General of the League of Nations; and

WHEREAS the provisions of the said Draft Convention, a copy of which is attached, are capable of being applied within the Union of South Africa ;

His Royal Highness the Governor-General be pleased to approve of the ratification of the said Draft Convention and of the communication of such ratification to the Secretary-

General of the League of Nations by the Government of the Union of South Africa.

(Signed) F. S. MALAN.

Approved in Executive Council. Minute No. 3045.      Approved in anticipation of the next meeting of the Executive Council.

Date: 29 October, 1923.      (Signed) ARTHUR FREDERICK

Certified true copy.

Signed) H. GORDON WATSON,      (Signed) H. GORDON WATSON,  
Clerk of the Executive Council.      Clerk of the Executive Council.

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